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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1237

M. LOIS CORSON,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE.

MARION ALKER,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE.

HARRY J. ALKER, JR.,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE.
(Consolidated Cases)

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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STATUTES INVOLVED.

Section 145, Title 26, U. S. C. A. (Internal Revenue Code of 1939) (Penalties).

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.—"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 275, Title 26, U. S. C. A. (Internal Revenue Code of 1939).

"Period of Limitation upon assessment and collection."

Except as provided in Section 276—

(a) General Rule. "The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in Court without assessment for the collection of such taxes shall be begun after the expiration of such period."

(c) Omission from gross income. "If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in Court for the col-

lection of such tax may be begun without assessment, at any time within five years after the return was filed.

Section 276, Title 26, U. S. C. A. (Internal Revenue Code of 1939).

Same—Exceptions.

(a) False Return or No Return. "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment, at any time."

Section 293, Title 26, U. S. C. A. (Internal Reveune Code of 1939).

Additions to the tax in case of deficiency.

(b) Fraud. "If any part of any deficiency is due to fraud with intent to evade tax, the 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in Section 3612 (d) (2)."

Section 294, Title 26, U. S. C. A.

"Additions to the tax in the case of non-payment."

(d) Estimated Tax. Failure to file declaration.

"In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this sub-paragraph with respect to any in-

stallment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this sub-paragraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under Sections 32 and 35."

Section 1112, Title 26, U. S. C. A. (Internal Revenue Code of 1939) (26 U. S. C. 1952 Ed. Section 1112).

"Burden of Proof in Fraud Cases."

"In any proceedings involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect to such issue shall be upon the Commissioner."

Section 7454, Title 26, U. S. C. (Internal Revenue Code of 1954). Provides: (a) Fraud—

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate."

Section 7483, Title 26, U. S. C. (Internal Revenue Code of 1954).

"The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in Section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within three months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by an adverse party to the proceeding within four months after such decision is rendered."

Section 7482, Title 26, U. S. C. (Internal Revenue Code of 1954). Court of Review.

(a) Jurisdiction. The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except or provided by Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury; and the judgment of any such Court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

(b) Venue.

(1) In General.—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the Circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or if no return was made, by the United States Court of Appeals for the District of Columbia.

(2) By Agreement.—Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary or his delegate and taxpayer by stipulation in writing.

(c) Powers.—

(1) To Affirm, Modify, or Reverse. Upon such review, the Courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

Section 1635 (b) and (c) Title 26 U. S. C. A. (I. R. C. 1939).

"False return or no return. In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment, at any time."

(c) "Willful attempt to evade tax. In case of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment, at any time."

Sections 3312 (b) and (c) Title 26 U. S. C. A. (I. R. C. 1939).

(b) "False return or no return. In case of a false or fraudulent return with intent to evade tax, or of the failure to file a return within the time required by law, the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment, at any time.

(c) "Willful attempt to exade tax. In case of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment, at any time."

Title 28 U. S. C. A. Section 1254 provides,

"Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree * * *"

FEDERAL RULE OF CIVIL PROCEDURE CITED.

Rule 52. Findings By the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses. The findings of a Master, to the extent that the Court adopts them, shall be considered as the findings of the Court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

M. LOIS CORSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MARION ALKER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

HARRY J. ALKER, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

(Consolidated Cases)

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DECISION OF THE TAX COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

M. Lois Corson, Marion Alker and Harry J. Alker, Jr., hereby respectfully petition your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the decision of the Tax Court of the United States, and in support thereof, submit the following data:

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit does not appear, as yet, to have been reported except in 67-1 U. S. T. C. #9114. A copy of same is in the Appendix hereto at page 82 .

The opinion of the Tax Court of the United States is reported in 24 T. C. M. 1107; T. C. Memo. 1965-214; Dec. 27516 (M). A copy of same is contained in Petitioners' Appendix, page 258A.

JURISDICTION.

The judgment and opinion of the Court of Appeals was filed on December 8, 1966, and a timely Petition for Rehear-

ing was filed with the said Court, which was denied on January 9, 1967.

The statutory provision conferring jurisdiction on Your Honorable Supreme Court to review the said judgment and opinion by Certiorari is that contained in Title 28 U. S. C. Section 1254.

The jurisdiction of the Court of Appeals was invoked under Sections 7482 and 7483 of Title 26 U. S. C. (Internal Revenue Code of 1954).

The Tax Court's jurisdiction is provided in Sections 7442 and 6213 of Title 26 U. S. C. (Internal Revenue Code).

The judgment of the Court of Appeals for the Third Circuit was entered on December 8, 1966. A timely Petition for Rehearing was filed with the Court, which was denied by it on January 9, 1967.

Copies of the Judgment and Denial of the Petition for Rehearing are contained in the Appendix hereto at pages 79 and 86, respectively.

QUESTIONS PRESENTED FOR REVIEW.

I. Did the Court of Appeals err in not finding (a) that the Tax Court clearly erred in its findings as to petitioner's tax deficiencies and as to penalty deficiencies and fraud pertaining to petitioner Harry J. Alker, Jr.? and

(b) That the Tax Court's Findings of Fact and Conclusions of Law were clearly erroneous within the meaning of Rule 52(a) Federal Rules of Civil Procedure? and

(c) That there was not substantial evidence to support the Tax Court's Findings including fraud upon the disputed facts herein? and

(d) That the Tax Court's Findings worked a clear injustice upon the petitioners, and that the Commissioner in

the civil tax case was bound by and restricted to the figures of income and taxes produced and computed in the criminal trial?

II. Does the statute of limitations bar assessment and collection of its asserted deficiencies against petitioner Harry J. Alker, Jr.?

III. Whether a taxpayer's prior criminal conviction for willfully attempting to evade and defeat a tax, collaterally estops him from challenging the imposition of civil fraud penalties proposed to be assessed against him for the same years?

IV. Can the Tax Court properly invoke the doctrine of collateral estoppel in the instant case, and should the Court of Appeals have made findings as to same?

STATEMENT OF THE CASE.

This is a petition to your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the Decisions of the Tax Court of the United States in three related cases which were consolidated for trial and appeal.

There were three petitions for review of the decisions of the Tax Court. The main suit, #15840, is against Harry J. Alker, Jr. The other two petitioners, Mrs. M. Lois Corson and Miss Marion Alker, are sisters of Mr. Alker. Those #15836 and #15838, while closely related to #15840, are separate matters and no fraud issue is involved. The Commissioner of Internal Revenue has filed protective contingent cross petitions in both #15836 and #15838 for use in the event the Court of Appeals disagreed with the decisions of the Tax Court regarding them.

The Tax Court found that Mr. Alker has failed to file a tax return for 1946, that he filed delinquent returns for 1947, 1949 and 1950; that there were substantial deficiencies in his returns for 1947, 1948, 1949 and 1950. Fraud penalties on the returns imposed by the Commissioner under Section 293(b) of the Internal Revenue Code of 1939 were upheld for the years 1947, 1948, 1949 and 1950. Penalties were assessed on all five years for not filing estimates of income. A tax deficiency for 1946 was found together with a 25% delinquency for that year.

The foundation of the Tax Court's findings of fraudulent deficiencies in tax payer's returns for 1947 to 1950 inclusive was his 1958 conviction in the United States District Court for the Eastern District of Pennsylvania of wilfully attempting to defeat and evade federal income taxes by filing false and fraudulent returns for said years. The Court of Appeals for the Third Circuit affirmed that conviction, *United States v. Alker*, 260 F. 2d 135 (3 Cir. 1958). Certiorari was denied, 359 U. S. 906 (1959), rehearing denied, 359 U. S. 950 (1959). The full record of those criminal proceedings by stipulation of the parties was put into evidence during the Tax Court trial.

The said stipulation provided, . . . "It is agreed that the same persons, if called as witnesses in this case, would testify as they did in the United States District Court for the Eastern District of Pennsylvania in the aforesaid action entitled U. S. A. v. Harry J. Alker, Jr., No. 18306, and that such testimony as set out in the aforesaid 'Exhibit J', 'Exhibit K', 'Exhibit L' and 'Exhibit M' shall be considered as having been given in the present case, and it is agreed that the Exhibits in the aforesaid cases entitled U. S. A. vs. Harry J. Alker, Jr., No. 18306, copies of which are affixed to the schedule attached, marked 'Exhibit N', shall be considered as having been properly introduced in the present case."

The Commissioner did not, in the civil tax trial, produce any witnesses as to the years 1947, 1948, 1949 and 1950. As to year 1946, he produced one witness who testified to an immaterial and irrelevant rental item which was objected to.

The Commissioner did not in any of his pleadings plead the issue of collateral estoppel. It never became an issue in the cases and was not mentioned until the Tax Court did, in its opinion.

The tax case as to petitioner, Harry J. Alker, Jr., also included the years 1942, 1943, 1944 and 1945. The Tax Court found that on the record as a whole the Commissioner failed to carry his burden of proof of fraud for any of the years 1942 to 1946, inclusive, and in the absence of proof of fraud the deficiencies determined for the years 1942, 1943, 1944 and 1945 were barred by the statute of limitations.

The petitioner, in the civil tax trial, produced witnesses besides his accountants, to prove the value of the Freihofer Baking Company stock transferred to him by Mrs. Sara Freihofer as being $200.00 per share; and to prove he did not receive any of the checks amounting to approximately $96,000.00 from the Estate of Winfred S. Hurst, Deceased, as income but that the same were issued to carry out the purposes of trust provisions contained in Mr. Hurst's will. Paragraph "Sixth" of the last will of Winfred S. Hurst provides as follows:

> "All the rest, residue and remainder of the property and estate, of every kind and wheresoever situate, real, personal and mixed, of which I shall die seized and possessed, and all of the property and estate, of every kind and wheresoever situate, real, personal and mixed, as to which I shall have any power of appointment whether by will, deed or other writings, I give, devise and bequeath as follows:
>
> "(a) One hundred thousand dollars ($100,000)

thereof to the trustee hereinafter named, in trust, nevertheless, to hold, retain in cash or invest and keep invested in United States bonds or certificates * * *." Exhibit P-2. Harry J. Alker, Jr., is the executor and trustee named in Mr. Hurst's will.

The adjudication of the Montgomery County Orphans' Court, dated December 8, 1955, in the Estate of Winfred S. Hurst, Deceased, discloses that Harry J. Alker, Jr., was only allowed by that Court an attorney's fee of $6,500.00 and commissions of $17,000.00, instead of all of the greater amounts of monies claimed by him in his estate accounting filed with the Court. Exhibit P-49.

The Court of Appeals finds, from a recheck of the voluminous criminal trial record it is satisfied that there was sufficient evidence of substantial understatement of income; sufficient evidence of the willfulness element in the said fraud statute and of the non-filing of the 1946 return. It directly held that there was ample proof before the Tax Court for the latter to find as it did that:

> "Our own review of all of the evidence in the record before us leaves no doubt in our minds that respondent has carried his burden of proving fraud herein by clear and convincing evidence and that a portion of the deficiency found by the respondent in each of the taxable years 1947 through 1950 is due to fraud with intent to evade tax." And that, "Because of our above stated view, there is no need at this time of passing upon the Commissioner's alternative argument that collateral estoppel should be applicable to the taxpayer in the present circumstances."

The Court of Appeals also affirmed the Tax Court's findings of the value of the Freihofer Baking Company stock transferred to Mr. Alker by Mrs. Sara Freihofer and as to the Winfred S. Hurst Estate checks.

In the criminal case, the prosecution proceeded upon the theory that in each of the years involved, defendant had received substantial income in the form of dividends and interest on securities, directors' fees and earnings from his profession which were not reported in the tax returns which he filed. With the exception of a deduction taken by defendant in 1947 and 1948 for rental of an apartment in the Warwick Hotel and a minor adjustment in his deductions for office rental and telephone expense for each year, the prosecution did not contend and presented no evidence to indicate that defendant was not entitled to the deductions which he claimed in his returns. (To the contrary, the Commissioner did not allow all of such deductions which increased the amount of alleged income unreported.)

Moreover, the evidence indicated that many of the legal fees received by defendant did not belong entirely to him and that portions of such fees were paid by him to various attorneys who had been associated with him in handling the matter for which the particular fee had been received. In reporting his gross earnings from his profession, defendant did not include therein the amounts paid by him to these other attorneys. With one exception which we will subsequently discuss, the prosecution did not take issue with these exclusions from gross income.

The evidence produced by the prosecution in support of its theory fell into several distinct categories. With respect to the dividends and interest received by defendant, numerous witnesses from the various corporations whose stocks or bonds were registered in the name of defendant gave testimony, supported by cancelled checks payable to the order of and indorsed by defendant, concerning dividends and interest paid to him as registered owner of these securities. Defendant had indorsed most of these checks to his sister, M. Lois Corson and in a few instances, to another sister, Marion Alker. The remaining checks had been de-

posited to the credit of defendant. The substance of the testimony of these witnesses is set forth in the stipulation of counsel filed in this Court.

The prosecution's evidence concerning directors' fees received by defendant consisted for the most part of testimony by witnesses from the corporations of which defendant was a director, and cancelled checks from these corporations payable to the order of defendant. The substance of this testimony is also contained in the stipulation of counsel. In addition, to establish some of the directors' fees, the Government relied upon certain entries transcribed from the defendant's books and records which had been made available to the revenue agents who investigated defendant's returns.

By far the largest item of alleged unreported income in each year involved earnings from defendant's practice of his profession. To show the amount of such earnings, the Government in some few instances resorted to the testimony of persons who had paid fees to defendant for legal services. The largest item in this category was a block of 200 shares of the stock of the Freihofer Baking Company which, according to the testimony of Mrs. Sarah Freihofer, had been transferred to defendant as payment for legal services rendered by him for a period extending back to 1932.

On direct examination Mrs. Freihofer said that she had turned over the 200 shares to defendant in December, 1950. This was corroborated to some extent by the testimony of Mrs. Lucy M. Hurley, a friend of Mrs. Freihofer. However, on cross-examination, it appeared that the shares had not been transferred to defendant on the books of the Company until February, 1951, and that Mrs. Freihofer had received the dividends on the shares up to that time, and Mrs. Freihofer admitted that she could have turned over the shares to defendant in January, 1951. In a letter written by defendant to the Internal Revenue Service during the course of

its investigation, he stated that he had received the stock partly in 1948, partly in 1949 and partly in 1950. In addition, former Revenue Agent Mednick testified that at one time defendant had told him that he had received the stock a long time ago. By the opinion testimony of an employee of the Internal Revenue Service, the prosecution sought to establish the value of this stock in 1950 at $510 per share. (It was stipulated in the civil tax case that Mr. Alker received 50 shares in 1948, 100 shares in 1949 and 50 shares in 1950).

In addition to the foregoing evidence of earnings from defendant's profession, the prosecution relied upon certain written statements prepared at various times by defendant's accountant, Horace Rhoads, and oral statements made by defendant concerning fees and commissions from the Freihofer Estate and Hurst Estate and transcriptions from defendant's books and records which had been made by the revenue agents in the course of their investigation (Exhs. G-44, 71, 77, 94-97, 100, 101). This evidence may fairly be said to constitute the real basis of the prosecution's case.

Exhibit G-71 was a statement prepared by Rhoads and submitted by defendant to the auditor of the Freihofer Estate on May 14, 1951. It lists certain fees received from the Estate in the years 1947-1949 inclusive by "Hall, Bruce, Alker, Attorneys". These three were the attorneys of record in the administration of the Estate, but the testimony of Mr. Donahue, the auditor of the Estate, clearly shows that several other attorneys were associated with them in the handling of the Estate. The statement shows fees paid from the Estate of $92,100 in 1947, $32,600 in 1948 and $148,000 in 1949. A. D. Bruce testified that his share of the fees from the Estate was $5,000 in 1947 and $10,000 in 1949. Edwin Hall, II, stated that he received $5,000 in 1947, $500 in 1948 and $30,000 in 1949.

Exhibit G-77 was a written statement submitted by defendant to the Internal Revenue Service on April 29, 1954 in connection with the audit of the income tax return of the Freihofer Estate and purports to list certain administration expenses of the Estate for the years 1947 and 1948. It contains certain fees said to have been paid to defendant in those years. At the time this statement was submitted by defendant, he also produced certain checks of the Estate, payable to himself to substantiate the various fee payments. The amounts set forth in this statement for each of the years were substantially less than the amounts set forth in the statement furnished to the auditor of the Freihofer Estate.

Exhibits G-94, 95, 100 and 101 were transcripts made from defendant's books and records by Revenue Agent Segal and former Agent Mednick and list the receipts from defendant's profession which they found to be reported therein for the years 1947 and 1948 as identified for them by defendant and his accountant. As shown on G-94 and G-95, these receipts, consisting of fees and commissions, amounted to $102,051.28 for 1947, less payments to other lawyers of $3,585 and to $117,988.24 for 1948, less payments to other lawyers of $14,397.09 (Stipulation). As shown on G-100, the receipts amounted to $97,373.63 for 1947, less payments to other lawyers of $2,335 and $88,433.50 for 1948, less payments to other lawyers of $14,522.09 (Stipulation). G-101 merely corroborated testimony given by other witnesses concerning fees paid to defendant in January, 1947 in the total amount of $3,000. With respect to fees from the Freihofer Estate, the amounts shown in G-94, 95 and 100 were also substantially less for each year than those contained in the statement submitted to the auditor of the Estate.

Exhibits G-96 and 97 were statements prepared by defendant's accountant and submitted by defendant to former Agent Mednick during the course of his investigation. They contained a list of the defendant's earnings from his pro-

fession, his business expenses and the fees paid by him to other attorneys who were associated with him in the handling of various matters for 1949 and 1950, respectively. They showed total fees and commissions of $239,457.22, less fees paid to others and expenses of $101,490 for 1949 and gross fees and commissions of $60,253.46, less fees paid to others and expenses of $11,811.25 for 1950 (Stipulation).

Exhibit G-44 was a series of checks payable to defendant which were submitted by him to the Internal Revenue Service in 1952 in connection with the audit of the estate tax return in the Hurst Estate wherein defendant was executor and attorney. Revenue Agent Gurbarg stated that defendant gave him these checks and told him that they were in payment of a fee for services to the decedent during his lifetime, his executor's commission and his fee as attorney for the Estate; the checks, all of which were issued in 1950, amounted to $90,206. These checks were furnished, it was said, to substantiate certain deductions for debts and administration expenses claimed upon the return for that Estate.

Defendant took the stand in his own behalf. He explained that he had indorsed the dividend checks received by him to his sisters because they were the real owners of the securities even though the securities were registered in his name and that these dividends were included in their income tax returns for the appropriate years. With respect to the dividends on the stock of the National Dairy Products Company, he testified that these belonged to a Mrs. DuBan pursuant to an agreement made with her and her husband when they had made advances to him, and that he had paid them over to her by checks drawn on his attorney account. Defendant said that during all the years in question he usually worked until midnight or later each day because of the demands of his practice, and as a result, it was necessary for him to maintain an apartment at the Warwick Hotel

in Philadelphia even though his permanent residence was located in Norristown.

Defendant described his practice and stated that in many of the matters which he handled, other attorneys were associated with him, although he, alone, had appeared as counsel of record; in this connection he named the attorneys in addition to Hall and Bruce who had participated with him in the administration of the Freihofer Estate and identified checks issued by him to lawyers who assisted him in various matters.

He explained that he had made certain advances to Mr. Griffith who worked with him in the Griffith Estate on account of fees which would subsequently be due to Griffith, and when the fee was paid in 1949, he had charged part of it ($6,000) against the advances previously made to Griffith, who by that time had died, and did not include that amount in his gross income. Mednick had testified that in considering the fees paid to other lawyers by defendant in 1949 as shown upon the statement furnished to him by defendant, he had concluded that since Griffith was dead at the time, no credit should be allowed for the advances previously made to him.

Defendant also testified that all of his personal financial records and those relating to the various estates in which he was involved, were kept by bookkeepers employed by him, that the tax returns involved in this case had been prepared by his accountant, Rhoads, from these financial records, and that he depended entirely upon his bookkeepers and accountant in this regard because all of his time was devoted to the handling of his practice. Moreover, he said that he had filed an income tax return for 1946; this was in answer to the prosecution's evidence, admitted over objection of defense counsel that defendant had filed no return for that year.

Finally, defendant stated that his fee and commission in connection with the Hurst Estate were not approved by the probate court until after 1950, and that the fee finally approved was $20,000 rather than $50,000, and that he had reported the fee and commission in his tax returns for the years 1952 and 1953. Further, that he had not told Agent Gurbarg that the said checks were paid to him on account of his fee and commission but were used in providing a cash trust fund of $100,000 as provided in Mr. Hurst's will.

In addition to his own testimony, defendant presented evidence showing that the value of the stock of the Freihofer Baking Company was $200 per share and numerous character witnesses who testified that his reputation in the community for being a law abiding citizen was good.

In rebuttal, the prosecution presented two witnesses who stated that defendant's reputation for honesty and integrity was not good.

Exhibit G-102 is a computation prepared by Revenue Agent Vosselman. It is a summary of the prosecution's contentions concerning the evidence introduced by it during its case in chief. What it shows with respect to the prosecution's theory of defendant's additional income and tax deficiencies is set forth in Schedules A and B to the stipulation of counsel.

Exhibit G-102A is a computation also prepared by Revenue Agent Vosselman. It makes adjustments in the computation contained in Exhibit G-102. These adjustments are based upon evidence introduced by defendant concerning payments made by him to other lawyers. The adjustments reduce defendant's net income and tax deficiencies as shown on Exhibit G-102. By reason of the adjustments, $1,474.34 should be deducted from net income and approximately $1,135 from the tax deficiency for 1947; $4,964.65 should be deducted from net income and approximately $3,165 from the tax deficiency for 1948; $2,978.24 should be deducted

from net income and approximately $1,441 from the tax deficiency for 1949; and $775.50 should be deducted from net income and approximately $647 from the tax deficiency for 1950 (N. T. 1592-1613).

Schedule B. The computation of net income and tax liability as prepared by Mr. Vosselman is as follows:

SCHEDULE B

Computation of Net Income and Tax Liability

	1947	1948	1949	1950
Dividends and interest	2,523.60	8,257.55	10,466.40	20,186.75
Directors' fees	605.00	675.00	750.00	615.00
Net profit from profession	80,598.62	50,567.05	44,839.55	159,426.08
Capital Gains	—	—	2,529.25	3,485.46
Rental Loss	—	(4,789.10)	(8,320.48)	(4,283.96)
Adjusted Gross income	83,727.22	54,710.50	50,264.72	179,429.33
Less itemized deductions				
Contributions	302.00	277.00	1,247.00	808.25
Interest			24,506.50	16,511.54
Taxes			81.61	85.27
Medical and Dental Expense	2,500.00	2,500.00	1,250.00	
Miscellaneous			30.00	24.00
Total Deductions	2,802.00	2,777.00	27,115.11	17,429.06
Net Income	80,925.22	51,933.50	23,149.61	162,000.27
Less Exemptions	1,500.00	1,200.00	1,200.00	1,200.00
Balance subject to tax	79,425.22	50,733.50	21,949.61	160,800.27
Tax liability on the above balance	47,266.71	24,065.71	7,329.57	110,367.69
Tax liability reported on the return	—	—	3,643.11	—
Deficiency	47,266.71	24,065.71	3,686.46	110,367.69

(Page 2 of Exhibit G-102)

The indictment charged Mr. Alker with additional net income and tax due as follows:

Year	Net Income	Tax Due
1947	$83,591.25	$49,133.55
1948	64,368.63	32,276.75
1949	71,274.99	36,853.03
1950	78,502.24	43,498.04
	Total	$141,761.37

Harry J. Alker, Jr.

During the years involved in this proceeding, petitioner, Harry J. Alker, Jr., was a practicing attorney-at-law with offices in the Land Title Building, Philadelphia, Pa., and at his home on Swede Street in Norristown, Montgomery County, Pa. His principal sources of income were from his law practice, corporation directors' fees, executors' commissions, dividends, interest and capital gains.

His books and records were kept by various of his office employees under the supervision of Horace S. Rhoads, C. P. A., his accountant, and his income tax returns for the years involved herein were prepared by Mr. Rhoads. His original books and records were produced at the civil trial of the matter and offered into evidence. They were complete and adequate (with the possible exception of some items for 1949) and were sufficient and adequate enough to establish his correct income and expenditures. A considerable portion of his legal practice was in the preparation of income and estate tax returns and the handling of estate and tax matters for his clients.

Petitioner is now about 84 years of age. He was in ill health during the years under consideration and was hos-

pitalized from time to time. He has never been married. He has lived with his sister, M. Lois Corson, since the death of her husband in 1942.

Petitioner, Harry J. Alker, Jr., had his principal residence in Norristown, Pa., and also stayed at the Warwick Hotel in Philadelphia when his work necessitated him to remain in Philadelphia.

Petitioner, M. Lois Corson, a widow, and petitioner, Marion Alker, unmarried, are Harry J. Alker's sisters. Mrs. Corson resided with Harry, and Marion Alker also resided at Norristown and another hotel in Philadelphia.

All of the petitioners filed Federal income tax returns for the respective involved years with the Collector of Internal Revenue at Philadelphia. However, the Commissioner determined that Harry did not file an income tax return for 1946 and the Tax Court so found. Harry denied this finding.

The Tax Court has found that the returns filed by Harry were in some respects incomplete and were lacking in detail, schedules and other required information. The Tax Court has also found that Mr. Alker filed delinquent returns for 1947, 1949 and 1950 without reasonable cause or excuse. Also that he failed to file any declarations of estimated tax for any of the years before the Court without reasonable cause or excuse.

The Commissioner determined and the Tax Court so found that the 200 shares of Freihofer Baking Company stock turned over to Mr. Alker had a value of $510.00 per share, as follows:

1948—$25,500.00	
1949—$51,000.00	
1950—$25,500.00	$102,000.00

Mr. Alker contends the shares had only a value of $200 per share so that the taxable income would be:

1948—$10,000.00	
1949—$20,000.00	
1950—$10,000.00	$40,000.00

He also contends that if the shares had such a value of $510.00 the balance between $102,000.00 and $40,000.00, or $62,000.00 belonged to Mrs. Freihofer, as their agreement was for the 200 shares at a value of $200.00 per share.

M. Lois Corson

Petitioner, M. Lois Corson, reported net income for 1948 on her return of $1,381.61, which respondent increased as follows in its deficiency notice for that year:

Increase in rental income	$2,952.16
Disallowance of interest paid	2,715.48
Disallowance of taxes paid	500.00

This resulted in corrected net income of $7,549.53 for 1948.

For the year 1950, respondent made adjustments in M. Lois Corson's income as follows:

Increase in dividends	$ 716.20
Disallowance of loss from rentals	3,918.89
Disallowance of interest paid	4,989.95

This resulted in increasing net income reported of $5,-434.08 to $15,059.12.

Her husband, Henry F. Corson, with whom she owned a large residential property at Villanova, Pennsylvania, in tenancy by the entireties, died in 1942, and thereafter she made her home with her brother, Harry, either in Norris-

town or at the Warwick Hotel. She did not thereafter reside in this house. She expended monies for real estate taxes, interest on mortgage and for upkeep and repairs of this property in 1948 and 1950, which the respondent disallowed but which the Tax Court has allowed. The Tax Court has not allowed her, however, other deductions including depreciation, storage, interest payments, payments to a housekeeper as being ordinary and necessary expenses, or paid for the production or collection of income or for the conservation or maintenance of income-producing property. She contends they are proper and lawful deductions and should be allowed same.

Marion Alker

Petitioner, Marion Alker, reported net income for 1948 in her income tax return of $794.71 which respondent increased as follows in his deficiency notice for that year:

Increase in dividends	$8,103.17
Increase in rental income	$1,806.79
Disallowance of medical expense	$1,250.00

These adjustments resulted in corrected net income of $11,954.67 for 1948.

For the year 1950, respondent made adjustments in her income as follows:

Increase in dividends	$2,891.96
Increase in rental income	$ 984.84
Disallowance of medical expense	$1,250.00
Disallowance of interest paid	$6,602.44

Marion Alker testified that Horace Rhoads handled her affairs and prepared her tax returns for 1948 and 1950, and that she had turned over all her records to Mr. Rhoads. That he would be the one to explain her tax returns.

She further testified that she owns the 17th Street property involved herein, having bought it in 1945. That Mr. Rhoads and Griffith and Company, accountants, had, at conferences with officials of the Internal Revenue Service, produced and shown to such officials all of her checks, receipts and other records pertaining to such tax returns. See "Exhibit P-43."

Miss Marion Alker is an ill woman and hard of hearing (Tr. 263-277).

Horace Rhoads, C.P.A., and Mr. Alker's accountant (now deceased) was ill at home and his deposition and testimony had to be taken at his home.

Mr. Rhoads testified that he prepared Marion Alker's tax returns for years 1948 and 1950 from records given to him by her. That he could not now find her records. That he had had her check books, deposits she had made, rents and other receipts from stocks. That Griffith and Company had prepared a report of her income and disbursements and filed it with the Internal Revenue Service. That they went over all of her records with the said officials.

He also testified that he knew personally Marion Alker was a straw party in the Estate of Lulu Mylin. That she had turned over the dividend checks to the Mylin Estate. That the reason for doing so was that the Mylin girls were the estate executors and that under state law they couldn't transfer them to themselves.

That she was also a straw party for her brother, Harry J. Alker, Jr., and for her sister, M. Lois Corson, and turned their dividend checks over to them (Tr. 335-340).

The petitioners, in their Petitions for Review, contended that the Tax Court's findings were arbitrary; (a) that certain of them were clearly erroneous; (b) that it erred as to the burden of proof as to deficiencies and fraud; (c) that it erred with respect to treatment of the "Sarah Freihofer" stock transactions; (d) that it erred in its lack of findings

with respect to the "Winfred Hurst Estate" checks; (e) that there was not sufficient credible and competent evidence to support its findings; (f) that its findings were against the great preponderance of the credible testimony; (g) that its decisions and opinions did not reflect or represent the truth and right of the cases; (h) and that the whole record shows convincingly, definitely and finally that a mistake had been committed by the Tax Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The petitioners submit to this Honorable Supreme Court that they have good and sufficient special and important reasons for the granting of a writ of certiorari in the instant matters, lawful, and out of all good conscience, justice, fairness and equity.

The petitioner, Harry J. Alker, Jr., submits and contends that, in these days, when an individual's personal liberties, rights and privileges are being stressed and protected by this Supreme Court, that his should be included therein. Among the rights that he believes and claims have been violated by the Government and lower Court decisions, are those of due process, equal protection of the law, and a fair trial as provided by the Fifth Amendment to the Constitution of the United States.

The petitioners further submit that their reasons are included in the following category of reasons, to wit:

(a) The Court of Appeals for the Third Circuit and the Tax Court have decided important questions of Federal law, which have not, but should be, settled by this Supreme Court.

(b) That the said above Courts have decided Federal questions in a way in conflict with applicable decisions of this Court, and

(c) That the said above Courts have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The petitioners' counsel, in his opening statement to the Tax Court Judge, at the trial of the civil tax case, stated as follows:

> "Lastly, the petitioner would like to put on the record to this Court that he has been handicapped in preparing a proper defense to the respondent's allegations by the respondent's tactics and actions. That jeopardy assessments and liens were placed against him and all of his assets and property amounting to somewhere between $300,000 and $500,000 having been tied up by the respondent as well as his agents and officers, attacking and seizing all of his bank accounts and monies.
>
> "That petitioner has requested respondent on many occasions to please release some of his funds, anywhere from $2000 so that he could employ sufficient accountants to examine and summarize his books and records to ascertain his correct taxable income for all of the years involved. He alleges that the respondent has refused on every such occasion to release a dollar of petitioner's money to aid him in his defense and fought such actions for relief in the United States District Court.
>
> "Petitioner further submits that these actions of the respondent were and are in violation of his constitutional rights as provided by the Fifth Amendment to the Constitution, particularly as to due process, equal pro-

tection under the law, and a fair and just trial." (Pages 15 and 16 of Tax Court transcript.)

Petitioners' counsel, orally, presented the same difficulties to the Court of Appeals that petitioners were not able to retain counsel and accountants until the present persons agreed to aid them close to the date of trial.

Petitioner, Harry J. Alker, Jr., submits that the Court of Appeals seriously erred in not restraining the Tax Court's findings and the Commissioner's determinations, to the Government's proof and evidence, as produced by it in the criminal tax trial inasmuch as it did not produce and present any evidence to substantiate its allegations contained in the Commissioner's statutory notice of deficiency.

It appears the Tax Court Judge took these allegations as proof and evidence without any of such evidence and proof of same being put into the record. There were no Government witnesses present to testify to same and to be cross-examined by the petitioners. The revenue agent, upon whose report the case was based, was not presented in Court by the Government.

Therefore, petitioner contends that the deficiencies as claimed in the statutory notice should have been disregarded and the Commissioner should have been held to his evidence presented in the criminal trial. That it is very violative of petitioner's Constitutional Rights to decide that the Government is entitled to hundreds of thousands of dollars more than he has proven. Also that the Commissioner, himself, overcame the presumption of correctness of his statutory determinations when he stood upon his proof in the criminal tax trial.

Berguido v. Eastern Airlines, Inc., 369 F. 2d 874, 885-886 (Judge Kalodner's dissenting opinion); and

Freight Ways, Inc. v. Stafford, 217 F. 2d 831, 835 (8 Cir. 1955).

"The jeopardy assessment has becomes a fearsome weapon for punishment in the hands of the Commissioner and should be curtailed. He is actually exercising powers of the Court."

ARGUMENT.

I. The Court of Appeals erred in not finding (a) that the Tax Court clearly erred in its findings as to the petitioners' tax deficiencies and as to penalty deficiencies and fraud pertaining to petitioner, Harry J. Alker, Jr., and

(b) The Tax Court's Findings of Fact and Conclusions of Law were clearly erroneous within the meaning of Rule 52(a) Federal Rules of Civil Procedure; and

(c) There was not substantial evidence to support the Tax Court's Findings including fraud upon the disputed facts herein; and

(d) The Tax Court's Findings work a clear injustice upon the petitioners, and that the Commissioner, in the civil tax case, was bound by and restricted to the figures of income and taxes produced and computed in the criminal trial; and that Mr. Alker's constitutional rights were violated.

II. The Statute of Limitations Applies Herein.

As the Court of Appeals has upheld the Findings of the Tax Court we therefore refer the Supreme Court to the opinion of the Tax Court.

The Court in said opinion under "Findings of Fact", pages 8 and 9, states,

". . . The deficiencies determined by respondent for the three years 1947 to 1950, inclusive, were established on the basis of specific unreported items of income, evidence of which was found in petitioner's personal books and records and other sources, and the disallowance of certain claimed deductions. Legal fees reported by petitioner in his 1947 return in the amount of $68,307.79 were increased by respondent to $147,948.41. The latter figure includes $44,656 of allegedly 'unreported fees.' Expenses of $76,744.33 were claimed in the return and $46,606.95 were allowed by respondent. Petitioner's net income for the year was increased from a loss of $11,238.54 as reported to $109,185.76.

"Respondent's determination for the subsequent years 1948, 1949, and 1950 follow a similar pattern. Respondent also included in petitioner's income for 1947 dividends, rent, and capital gains which petitioner received and realized but which he failed to report in his return.

"In 1948 respondent increased net income from a loss of $10,204.29 as reported to $95,569.51; in 1949 from $14,975.77 to $308,242.12 and in 1950 from a loss of $27,512.02 to $92,703.83 . . ."

Petitioner submits that all that the Court has done here is to find what the respondent determined in his statutory notice of deficiency (90-day letter) but has not found and could not have found these determinations as facts proven in the trial of this civil case; other than that which was presented in the criminal trial and by stipulation, became part of the civil case. Also, that respondent by not putting any other competent evidence into the record of the civil tax case must therefore base and rest his case upon the evidence

elicited therein. That he, himself, by his actions has overcome the presumption of correctness of his jeopardy assessment and determination of deficiencies, as applied to Mr. Alker, in his 90-day letter.

In Merten's Law of Federal Income Taxation, Vol. 9, Section "50.63", Chapter 50, Page 181, it states, ". . . The Commissioner may lose the benefit of the presumption of correctness if it should be made to appear to the Tax Court that the Commissioner has made conflicting determinations against the same person in respect to the same income. In such event the burden of proof would be upon the Commissioner to establish the correctness of his determination . . ." It cites the following cases:

Revell, Inc. v. Riddell, 273 F. 2d 649, 659 (C. A. 9th, 1959);

Karan v. Commissioner, 319 F. 2d 303 (C. A. 7th, 1963);

Nat Harrison Associates, Inc., 42 T. C. 601 (1964);

Howard Const. Company, Inc., 43 T. C. 343 (1964);

Cohen v. Commissioner, 266 F. 2d 5 (C. A. 9th, 1955).

Section 50.64 therein states, ". . . The burden of proof has its limitations. The presumption that the Commissioner is right is procedural and cannot survive clear proof of facts put in evidence by a taxpayer unless such proof is challenged by contrary proofs or destructive analysis. . . ."

Rookwood Pottery Co. v. Commissioner, 45 F. 2d 43 (C. C. A. 6th, 1930);

Royal Highlander v. Commissioner, 138 F. 2d 240 (C. C. A. 8th, 1943);

Mac Levine, 31 T. C. 1121 (1959).

Section 50.73 "Mertens" states, ". . . a determination of a deficiency proves only that the taxes were determined and not that they were due."

Estate of Halley Tarr, T. C. Memo. of Dkt. 29614 (1952);
Sneath Glass Co., 1 B. T. A. 736, 740;
River & Rail Storage Co., 1 B. T. A. 1098 (1100);
Cleveland Home Brewing Co., 1 B. T. A. 87, 89;
B. B. Todd, Inc., 1 B. T. A. 762, 764;
J. M. Perry & Co., Inc. v. Comm., 120 F. 2d 123.

Summaries.

Merten's Law of Federal Income Taxation, Vol. 9, page 219, Section 50.79 states, "It is now a recognized practice to permit the introduction into evidence of summaries from complicated books of account. This practice constitutes an exception to the best evidence rule. The theory is that at any point of challenge cross-examination may bring out inconsistencies or inaccuracies in the summary by requiring the witness to refer to the original books. It has accordingly been held that tabulations of check stubs are admissible in evidence as a convenient form of presentation where there is a large number of such primary records and no question as to the accuracy of the transcript is raised."

It cites the following cases in support thereof:

U. S. v. Kelley, 105 F. 2d 912, 918 (C. C. A. 2nd, 1939);

In Moran v. U. S., 19 F. Supp. 557 (Ct. I. 1937), cert. denied, 303 U. S. 643, 82 L. Ed. 1102, 58 S. Ct. 642 (1938), rehearing denied, 303 U. S. 669, 82 L. Ed. 1125, 58 S. Ct. 829 (1938).

Internal Revenue Agents and Auditors were found competent to testify as to facts and information obtained from the books of account and records of the corporation. See also, O. O. Mitchell, B. T. A. Memo. of Dkt. 96041 (1940). If the rule in criminal cases,

discussed in Ch. 55A, relating to criminal prosecutions. Horace S. Clark, 39 B. T. A. 329.

"The stubs themselves were available in the hearing room for use and investigation by the adverse party."

In the case of *Abraham J. Gordon,* 268 F. 2d 105 (3rd Cir.), reversing and remanding the Tax Court decision (17 T. C. M. 842, Dec. 23, 166 (m), stated, inter alia, "* * * As we have seen, however, the Tax Court refused to accept this uncontradicted, unchallenged evidence. Its refusal appears to be predicated upon several grounds. The first is that the adjusting entry of $21,720.93 made in December, 1952, was not supported by evidence of the underlying computations or data upon which it was based. Such supporting evidence was quite unnecessary, however, in view of the fact that the existence of the entry itself in the books was stipulated and that its correctness was in no way challenged or attacked by the Government's evidence. Indeed, the stipulation of this and other book entries was made at the instance of the trial judge after the petitioners had come into Court with their accountant and their books prepared to testify in detail with respect to item. If there had been a suggestion by the Government at the trial, which there was not, that the stipulated book entries were insufficient to show the corporation's cost, the petitioners were ready to produce the underlying data. Compare *Rowland v. St. Louis & S. F. R. R. Co.,* 1917, 244 U. S. 106, 108."

Lawrence F. Casey in his "Federal Tax Practice", Vol. 2, page 232, Section 8.15 states, "Transcripts and Summaries—Under the prevailing practice it is permissible to prove voluminous accounting entries by introduction of a summary or transcript thereof for which a proper foundation has been laid, provided (i) that the books and records involved, duly authenticated, are in the Courtroom and available for examination, (ii) the person making the transcript

takes the stand and authenticates the summary or transcript, (iii) the items involved have in fact been accurately transcribed, and (iv) the summary is not so incomplete as to be misleading. The Tax Court has received a memorandum or summary of figures taken from check stubs, over objection by the Commissioner, without introduction of the original check stubs, upon the following basis: ". . . The original accounts, consisting of check vouchers and check stubs, were not introduced in evidence but were present in the Courtroom and offered for examination by respondent's counsel . . ." In the first place the non-introduction of the check stubs themselves seems incapable of creating possibility of prejudicial error. Their examination at the time of the hearing would have involved a protracted procedure, the result of which could have been of no benefit . . . The original records were produced and were as equally available for the examination of counsel for respondent or for his use in cross-examining petitioner as though they had been formally offered and received; and the receipt of the evidence was expressly conditioned upon such availability. This, was sufficient . . . Petitioner testified that he had himself made the transcripts from the original checks and stubs, or, where he had not done so, had himself checked the transcript's accuracy . . . We think in this respect petitioner's testimony was clearly admissible, and the use of the memoranda to refresh the witness' recollection as to complicated and voluminous dates and figures was certainly not error. (*Insurance Companies v. Weider*, 81 U. S. 375, 380.) That the memoranda were then admitted into the record as a convenient presentation of this evidence could have been no more prejudicial than the testimony of the witness which the memoranda did nothing more than tabulate . . ."

Summarization of Petitioner's Books and Records by Joseph J. Linsalata, C. P. A.

Joseph J. Linsalata testified that he was a certified public accountant of the State of Pennsylvania since December, 1943. That he was graduated from the University of Villanova in 1935 as a major in accounting. He was first employed by Lybrand, Ross Brothers and Montgomery until 1940. In 1940 he entered into a partnership with Samuel F. Eldridge, Junior, and Ranwood McKavey for one year. He then held a position as comptroller for one of his clients from September, 1941 to December 31, 1945. He then resumed the practice of public accounting in his own name. On February 1, 1946, the University of Villanova offered him an assistant professorship to teach advance accounting and federal income tax which he accepted. In 1952 he formed a partnership which exists today, having two other partners, each a C. P. A. That since 1949 he has been doing a substantial amount of tax work and has been a witness in several income tax cases (R. 61a-62a).

He further testified at Mr. Alker's request he took over his books and records for 1942 to 1950 to summarize them. That he received Mr. Alker's journals for cash receipts and cash disbursements for the years 1942 through 1950. In addition he received cancelled checks and bank statements and other miscellaneous data relative to those years. Such data was comprised of information that could be used under accounting methods as a medium for posting the books' original entries; the transcripts of the testimony as filed in the criminal trial briefs and appendices, and certain other documents including the 90-day letter and other items. He was also given copies of the respondent's stipulations that were not stipulated to for examination to see to the correctness of them based upon his information.

He also testified that the receipts book and the disbursement records based upon the method he used to summarize and in his opinion fairly represented what the petitioner's income or loss should have been for each one of those years. That the books and records were in the Courtroom. That he had put them into two binders, one for years 1942 to 1946 and the other for years 1947 to 1950. That he had marked all of the check books for identification purposes (R. 63a-64a).

Mr. Linsalata then proceeded to give his summarization from which was prepared an operating statement to determine a tax base.

The petitioner's check book stubs and cancelled checks for the years 1946 to 1950 were put and entered into evidence as "Exhibit No. P-9," being for year 1946; "Exhibit No. P-10" for year 1947; "Exhibit No. P-11" for year 1948, "Exhibit No. P-12" for year 1949; "Exhibit No. P-13" for year 1950 (R. 72a).

Respondent did not object to same except to the usual reservation as to completeness and correctness (R. 72a).

Mr. Linsalata explained to the Court (referring to the volume of records) that he and his men examined every one of the checks and compared them with the disbursements as shown on the books of account. Then he summarized the books of account and made his summaries for each year. That personal items of expense were included therein due to the respondent using personal living expenses in several of the involved years. He stated to the Court that if Mr. Cadden, respondent's trial counsel, asked him to substantiate any item included as expenses he had two of his men there ready to pull out the check immediately from his records to show the check was used as a posting medium to the cash disbursement journal (R. 75a-77a).

The accountant's work sheets were also entered into evidence as "Exhibit P-17" for 1946; for year 1947 "Exhibit

P-18" for the disbursements worksheet books; and "Exhibit P-19" for the disbursements worksheet books; for 1948 "P-20" for the receipts and "P-21" for the disbursements; for year 1949—"P-22"; for year 1950 "Exhibit P-23" for the receipts and "Exhibit P-24" for disbursements (R. 77a-80a).

The accountant summarized the years as follows (R. 80a-95a):

(1947)

Fees received (taken from books of account)		$101,887.40
Commissions		8,752.29
Total income from profession		$110,639.69
Less: Fees and commissions paid to others		12,712.14
Gross profit from profession		$ 97,928.55
Less: Operating expenses		79,379.16
Net profit from profession		$ 18,549.39
Plus—Other income		
Rental income	$1,291.00	
Directors' fees	550.00	
Dividends	1,159.00	
Interest	170.99	
Capital gain	541.44	
Miscellaneous	27.37	3,739.80
Adjusted gross income		$ 22,289.19
Less: Contributions	2,477.50	2,477.50
		$ 19,811.69
Exemption—Head of household		1,200.00
Tax base		$ 18,611.69

(1948)

Fees received		$100,232.39
Commissions		6,814.60
Total income from profession		$107,046.99
Less: Fees and commissions paid others		22,635.71
Gross profit from profession		$ 84,411.28
Less: Operating expenses		83,365.75
Net profit from profession		$ 1,045.53
Plus other income		
Dividends	3,302.20	
Directors' fees	750.00	
Interest	694.75	
Miscellaneous	356.96	
Rentals	622.00	
Capital gains	1,043.90	$ 6,769.81
Adjusted gross income		$ 7,815.34
Less: Contributions	614.92	
Medical	61.22	676.14
		$ 7,139.20
Less: Exemption		1,200.00
		$ 5,939.20
Tax base		$ 5,939.20

Included in said 1948 income is $10,000 from Sara Freihofer, being value of 50 shares of Freihofer Baking Company stock at $200 per share (charged by Government in criminal trial to Mr. Alker in year 1950).

(1949)

Fees received		$212,095.56
Commissions		6,186.56
Total income from profession		$218,282.12
Less: Fees and commissions paid to others		95,490.00
Gross profit from profession		$122,792.12
Less: Total operating expenses		104,604.21
Net profit from profession		$ 18,187.91
Plus: Other income		
Capital gains	2,529.25	
Directors' fees	750.00	
Interest	92.50	
Dividends	3,052.80	
Net rental income	974.00	
Miscellaneous	6.11	
Total other income		7,404.66
Adjusted gross income		$25,592.57
Less: Contributions	1,175.25	
Medical	1,515.90	2,691.15
		$22,876.67
Less: Exemption		1,200.00
Tax base		$21,676.67

In 1949 the receipts records were not available in detail. He had information but he also used other information to arrive at a figure including a detailed list of the Govern-

ment's figures which he was able to track down. He made exclusions from those figures which he thought were in order of $250,360.23 which represented a few items of income that was alleged to have been received. From Hurst Estate, $46,000, which Mr. Alker never received as income according to his information. He added 100 shares of Freihofer Baking Company stock at $200 per share or $20,000 to Mr. Alker's income (Tr. 95).

(These Sara Freihofer shares of stock were charged in criminal trial to Mr. Alker in 1950.)

(1950)

Fees received		$49,652.14
Commissions		7,530.28
Total income from profession		$57,182.42
Less: Fees and commissions paid others		11,155.50
Gross profit from profession		$46,026.92
Less: Total operating expenses		96,401.34
Net operating loss		(— 50,374.42)
Plus: Other income		
Dividends	5,309.20	
Directors' fees	615.00	
Rents	1,322.00	
Capital gains	3,308.81	
Interest		1,000.00
Royalties	21.57	
Other miscellaneous	13.47	
Total other income		$11,590.05
(Net loss)		(—$38,784.37)
Less: Contributions	1,402.25	
Medical	1,022.59	
		(— 2,424.84)
Less: Exemption		(— 1,200.00)
Loss		(— 42,409.21)

(This summary includes only charge for 50 shares of Freihofer Baking Company stock received by Mr. Alker from Sara Freihofer @ $200 per share or $10,000.)

(Government charged these 200 shares of Freihofer Baking Company stock to Mr. Alker in 1950 @ $510 per share or $102,000.)

(This summarization does not include the alleged receipt of payments of income from the Winfred S. Hurst Estate in 1950 as alleged by Government.)

In Mr. Alker's criminal trial, Mr. Frank Vosselman, Technical Adviser for the Regional Counsel's Office, Internal Revenue Service, summarized the Government's case and figures for the years 1947 to 1950, inclusive, as shown in the statement of the case, page 21, herein.

(Mr. Vosselman included in 1950 the 200 shares of Freihofer Baking Company stock given to Mr. Alker by Mrs. Sara Freihofer @ $510 per share, or $102,000.00.)

(By stipulation—50 shares were to be charged in 1948, 100 shares in 1949 and 50 shares in 1950.)

(He also included $92,000 received from the Estate of Winfred S. Hurst) in 1950, and all reported business and personal deductions.

(See Government Exhibits (criminal trial) G-102, pages 1, 2, 3, 4 and 5.)

(In 1949 and 1950 Mr. Vosselman allowed Mr. Alker interest deductions as page 3 personal items wherever Mr. Linsalata treated interest paid as a business deduction inasmuch as the income which is being taxed came from his profession.)

Mr. Alker testified in the criminal trial—Joint Appendix III (No. 12313), pages 743(a)-745(a), that he had received 200 shares of stock from Sara Freihofer divided into three payments which were returned by him and also appeared on her tax return. That she paid him for services in 1948, 50 shares of Freihofer Baking Company stock @ $10,000, in 1949, 100 shares @ $20,000, and in 1950, 50 shares @ $10,000. That the respondent would find that she had deducted it on her returns and the value of it was included in his returns

in the year received. That the $200 figure set as the value of the stock was that value set upon it by the Estate of William Freihofer auditor and creditor committee.

The Tax Court in its opinion finds that petitioner's original books and records were not produced at trial or offered in evidence. That they were incomplete and entirely inadequate to establish his correct income or expenses. That the agent reported that he had been unable to find books and records from which petitioner's income could be determined as the basis of gross receipts and business expenses. This is belied and contradicted by the Government in the presentation of its criminal case. The Court, in its opinion, used the word "reported" which it is contended is not competent evidence as the agent never testified in the civil tax trial. The petitioner contested, contradicted and disproved him and the respondent's determinations in the civil case.

According to Mr. Linsalata, who is a well qualified and experienced certified public accountant and very familiar with Federal taxes, Mr. Alker's records were adequate and sufficient to ascertain his correct taxable income for years 1947, 1948 and 1950, and practically so for 1949. There were produced for his summarization into evidence the petitioner's checks and check book stubs and the accountant's work sheets containing proof of petitioner's receipts from his cash receipt books (R. 63a-64a, 68a).

If, as the Court says, the agent reported the petitioner's books and records were not available or adequate, then his computations of income and tax must be incorrect.

Reference is called to the respondent's trial counsel's statement as to the introduction into evidence of the petitioner's records. He states (R. 66a), "No objection, sir. We don't concede naturally the correctness, but we do reserve the right naturally to question the completeness of the records as well as the correctness of them. But to the two vol-

umes which are offered in evidence as such, we offer no objection.

"Petitioner submits that by such action, respondent has waived any objection to the correctness and completeness of the records as he should have objected while the records were in the Courtroom and could have been put into the record."

It is to be noted that the Government in the criminal trial, as per "Ex. G-102", charged Mr. Alker with net profit from profession for the years 1947 to 1950, inclusive, of certain specified amounts while the respondent, in his statutory notice of deficiency (90-day letter) different amounts. A comparison of them discloses the following:

(The 90-day letter is attached to Petitioner's Petition.)

Net Profit From Profession

	"Ex. G-102"	*"90-Day Letter"*
1947	$80,598.62	$109,778.00
1948	$50,567.05	$ 88,324.74
1949	$44,839.55	$255,398.75
1950	$159,426.08	$ 72,332.90

As has been previously shown herein the respondent did not present any witnesses in the civil tax trial to prove his determinations, therefore it is submitted and contended by petitioner that he is restricted to the evidence he presented in the criminal trial as his attempted proof of his determinations of deficiencies and fraud in the civil trial. It is questioned whether in the criminal trial, the Government, for year 1950, could go beyond the indictment figure of $43,498.04.

It is interesting to note that in the above comparison the respondent reduced his figures for net profit from profession of $159,426.08 used in the criminal trial for 1950 to $72,332.90 in his 90-day letter upon which the civil case is based.

A perusal of the testimony in the Alker criminal trial given by Revenue Agent, Henry Segal, and Special Agent,

Herbert S. Mednick, contained in the Joint Appendix, Vol. II, pages 313(a) to 348(a) and pages 407(a) to 442(a) used in Mr. Alker's appeal from his criminal conviction to this Court of Appeals under No. 12313, certainly indicates these examming agents had the use of Mr. Alker's books and records for the years 1947 to 1950, inclusive, and that he cooperated with them.

As to Hurst Estate Checks.

Michael H. Gurbarg testified in the Alker criminal trial that he was the supervisor of the Federal Estate and Gift Tax Audit Section of the Internal Revenue Service and as such was connected with the audit of the Federal Estate Tax Return of the Winfred S. Hurst Estate tax return.

That he had conferences with Harry J. Alker, Jr., executor and attorney of said estate. That he questioned him as to items of deductions for executor's commissions, attorney's fees and for counsel fees for services rendered by him to Mr. Hurst during his lifetime. Using the estate tax return filed February 15, 1951, he pointed out Mr. Alker's claims for executor's commissions of $31,763.60, attorney's fees of $50,000.00, and professional services during his lifetime of $15,028.32.

That the only way he could tell how much was paid to Mr. Alker in order to substantiate the deductions were checks to prove the payment of the executor's and attorney's fees, and his fees for lifetime services amounting to $90,-206.00. That they were checks which Mr. Alker presented to him in the settlement of this estate to substantiate said deductions. Asked how these deductions were broken down he testified he knew from his recollection of what Mr. Alker told him (Vol. II—Joint Appendix—Criminal Trial, Court of Appeals, No. 12313, Pages 253(a) to 265(a).

The said estate tax return schedule J, Item No. 1 (Vol. III, Page 746(a)) (G-58) (781 d), indicates the said deductions were either "Estimated/Agreed Upon/Paid." None of them are crossed out so the return does not indicate such deductions were paid.

Mr. Alker testified in the criminal trial (Vol. III, Pages 746(a) to 754(a)) that he reported all the monies he received from the Hurst Estate, but as to receipts Mr. Rhoads would have to explain them as he kept the books.

His 1952 tax return was presented which indicated a return of commissions of $31,763.60 from the Hurst Estate and another $20,000 fee reported from said estate. He further testified (Vol. III, Pages 774(a)-776(a)) that Mr. Hurst's will had provided a trust fund be set aside of $100,000 in cash or "Governments". These checks of $92,206.00 were cashed, put into a safe deposit box and kept there until the Government bonds were bought. He explains that the amounts put on the estate tax return were only estimates and not that they had been paid—leaving an open question for the approval of the Court as to the amounts to be awarded (Vol. III, Page 78(a)).

Mr. Alker denied that he had told Mr. Gurbarg that a check for $15,028.32 was for expenses of $28.32 and $15,000 for professional services. He also denied that he had ever told Mr. Gurbarg that said checks supported said deductions (Vol. III, Pages 783(a)-785(a)).

Horace S. Rhoads testified about the Hurst Estate checks. He testified that he knew exactly where they went because he did it himself. That Mr. Alker opened up two accounts in the Broad Street Trust Company Savings Fund. That Mr. Hurst's will provided for a trust fund of $100,000 of cash to be put into Government bonds. That the checks were cashed and put into the two estate safe deposit boxes in the Broad Street Trust Company and then used to buy Government securities.

That it was not used by Mr. Alker as payments to him as a fee or commission, nor was it used by him at all. That he was positive of same under his affirmation and it was the honest truth.

(R. 197a-200a) Also, that he was subpoenaed by the Government in the criminal trial, but was not called by it.

As to the alleged income in 1949 and 1950 charged to petitioner by the Commissioner and his Revenue Agent as having been received from the Estate of Winfred S. Hurst, Deceased, the Court's attention is called to "Government Exhibit AN" presented in the criminal trial by the Government. The Revenue Agent in his Report therein, states that his examination disclosed that the taxpayer by the end of 1950 had withdrawn $275,000.00 from said estate, and apparently for his own purposes. The Revenue Agent then indicates how he computed and allocated income and tax for 1949 and 1950 from and for same as follows:

Petitioner claimed legal fees, commissions, and fees during decedent's lifetime totalling $96,791.92, so he charged petitioner with having received $46,499.22 as taxable income in 1949; and $50,292.70 for 1950 income less $12,263.50 reported by petitioner, making a balance of $38,029.20 for 1950.

This allocation and computation is completely contradictory to the Government's presentation of its case for all of the Hurst income ($90,206.49) having been received in 1950 by the petitioner.

Petitioner contends that the foregoing bears out and corroborates his testimony that he never told the Federal estate tax examiner, that he had taken this money as income to himself; but to the contrary had used the said monies to eventually purchase Government securities for the trust funds provided for in the decedent's will and to pay the other estate bequests and legacies. That he had fully ac-

counted for same in the Orphans' Court of Montgomery County, Pennsylvania.

His estate account and the Orphans' Court adjudication were put into the record of the civil tax trial as Exhibits 49 and 50.

It is argued that these moneys from the Hurst Estate could not be considered taxable income to the petitioner as petitioner had no claim of right to same. As shown in the Hurst federal estate tax return it has contained therein the question, as to legal fees and commissions, whether they have been paid, agreed upon or estimated, one of which is to be marked by the accountant. Mr. Alker testified that he did not mark any of them as such fees and commissions would have to await the approval of the Orphans' Court and were actually only estimates.

John E. Williams, Esq., in his book, "Preparing The Federal Estate Tax Return," page 136, states:

> "The amount of counsel fee may not have been determined when the federal estate tax return is prepared. There may be one or more legal problems not yet solved or functions not completed at that time. The estate tax deduction, for the purpose of Schedule J, can list an amount as estimated, agreed upon, or paid. The author makes it a practice, in asking counsel for information as to the amount of his fee, to ask him to suggest the amount of fee 'to be estimated for the purpose of the Federal Estate Tax Return.' This is all that is necessary for the tax return, and the request in that form is intended to avoid any indication of agreement or approval."

So we can see therefore that such a fee or commission had restrictions to it. Neither of them belong actually to the attorney or accountant until they have been approved by the proper Orphans' Court.

Particularly so in the instant Hurst Estate the Orphans' Court only awarded $6,500.00 to Mr. Alker as attorney's fee and $17,000.00 as commission. (See adjudication Exhibit P-50.)

In the case of *Jacobs v. Hoey,* 136 F. 2d 954, 2nd Circuit, 1943, the Court states, inter alia, page 956 (1, 2),

> "* * * The appellant claims that the payments made to him by the estate were nothing more than loans until the Surrogate had approved them. There are various decisions in the New York Courts to the effect that an executor cannot take commissions for management of the estate until they are allowed by the Court. But, in spite of this, the Court of Appeals has declined to disturb such a payment or to charge the executor with interest where the estate has been honestly and properly managed * * *." And on page 956,
>
> "* * * Though we should take the extreme view that under strict legal principles the plaintiff tortiously interfered with assets when he received advance commissions, he received them with the permission of his co-executors and members of the decedent's family who were chiefly interested in the estate and under a claim of right * * *."

In the Hurst Estate petitioner was accused of improperly managing same and was surcharged and penalized and did not have such permission. One cannot say therefore such Hurst money was income to him. The most that could be charged to him is that they were loans not income, if proven that he had used the same for his personal use.

In the Tax Court case of *Estate of Mary Hart Crawford, Deceased, Harry J. Alker, Jr., Executor, v. Commissioner of Internal Revenue,* filed May 18, 1966, Docket No. 445-63, 46 T. C. No. 23, the Tax Court Judge in his opinion states, inter alia,

"* * * Under Pennsylvania law, upon a decedent's death, legal title to his personalty, including choses in action, vests in his personal representative who is charged with the fiduciary duty of paying debts, taxes and the expenses of administration and distributing the remainder of the estate to the persons entitled to receive it. Shugar v. Garman, 2 Sadler 490 (Pa.) 4 A. 56; In Re Brothers Estate, 156 Pa. Super. 292, 40 A. 2d 156. The interest of a legatee or devisee under a will is not due and payable and the executor of decedent's estate cannot be compelled to distribute a legacy or devise until six months after the death of the testator. 20 Pa. Stat. Ann. Sections 633, 861. After six months from the date of the testator's death have elapsed, a legatee or distributee can petition the probate court for distribution of the legacy or devise, 20 Pa. Stat. Ann., Section 861, but he has no legal right to receive distribution of his interest until distribution is ordered by the probate court. In Re Glass' Estate, 115 Pa. Super. 448, 175 A. 736. The executor may distribute a legatee's or devisee's interest at any time after the testator's death and prior to the order of the probate court, but he does so at his own risk and the distributee does not receive legal title until an adjudication by the probate court. In Re Glass' Estate, Supra * * *."

It is claimed the same pertains also to executor's commissions and legal fees.

Mr. Rhoads also testified in his deposition, dated April 24, 1962 (R. 248a), that he was present when Mrs. Sarah Freihofer met with Mr. Alker in December, 1950. That it was agreed between Mr. Alker and Mrs. Freihofer, in his presence, that she was to give him 200 shares of Freihofer Baking Company stock at $200 per share.

Petitioner's counsel and his accountant have concentrated

in the civil trial (impartially) and in the briefs to really discover and show what taxes were actually owed by Mr. Alker for years 1947, 1948, 1949 and 1950, and whether or not they were substantial, and as to the correctness of the Hurst Estate checks of some $92,000.00 being taken by Mr. Alker as income in 1950, and the allocation and value of the 200 shares of Freihofer Baking Company stock paid to Mr. Alker by Mrs. Sarah Freihofer.

It is submitted, therefore, that the preponderance of the evidence is to the effect that Mr. Alker did not receive as income the aforementioned and described $92,000.00. This is corroborated by the Montgomery County Orphan's Court adjudication that he was only awarded some $23,500 in full and complete payment which it is believed he reported in his 1952 tax return. If this is so, his alleged 1950 income would be reduced by this $92,000.00. He had no claim of right to these funds until they were approved by the Orphans' Court.

As to the Sarah Freihofer stock, Mr. Alker's contentions are buttressed by Mr. Rhoads' testimony, the three members of the Freihofer Estate Creditor's Committee, Messrs. Donahue, Bishop and Horan (R. 27a-36a), (R. 51a-60a) as to $200 being the value of the stock, and the Pennsylvania Inheritance Tax return in the Estate of Gertrude Binder, who died July 23, 1951. That the value of $200 per share was put upon the Freihofer Baking Company stock held by her estate (R. 37a-38a) and the approval of the Philadelphia Orphans' Court of the auditor's report valuing the stock at $200 per share.

It is also offered that even if the stock was worth $510 per share, Mr. Alker did not benefit by this amount. The difference between the $102,000 and $40,000 would be due back to Mrs. Freihofer, as her agreement was to pay him $40,000.

Further, Mr. Alker never had the use of the stock in 1948,

1949 and 1950. It was not transferred to him until February, 1951.

Also, as to the 200 shares of Freihofer Baking Company stock given by Mrs. Sara Freihofer to Mr. Alker, as a legal fee, at $200.00 per share or a total of $40,000, the Court's attention is called to the testimony of Mr. Alker who testified that Mrs. Freihofer had agreed to this fee but which was to be allocated $10,000 for the year 1948; $20,000 for the year 1949; and $10,000 for the year 1950. That he had reported same in his tax return for 1948, 1949 and 1950, as had Mrs. Freihofer. This is verified by the Revenue Agent who states in his said report,

> "Further, the taxpayer submitted affidavits dated November 18, 1952, to Internal Revenue Agent B. A. Saladow, of the Camden, New Jersey Division, in connection with audits of Sara Freihofer's income tax returns for 1949 and 1950 which incorporates much the same explanation as to legal fees claimed as deductions in her returns."

The above certainly bears out and corroborates petitioner's contention that he and Mrs. Freihofer had a valid legal agreement that she was to pay him the total sum of $40,000.00 for his legal services rendered her.

Therefore, if the said 200 shares of "Freihofer stock" had a greater value than $40,000.00, any such greater amount would belong to Mrs. Freihofer and not Mr. Alker. It must also be borne in mind that this stock was not transferred until February, 1951, and was not used by Mr. Alker and Mrs. Freihofer received the dividends therefrom. The difference in value can surely not be charged as income to Mr. Alker, but must go to Mrs. Freihofer.

Mr. Linsalata in view of the facts elicited did not use, in his summarizations of petitioner's taxable income, such income from the Hurst Estate and only used the $200 value for the Sarah Freihofer stock payment.

If Mr. Linsalata's summarizations are found to be correct, as contended by petitioner, then it certainly indicates petitioner did not understate substantially his income for years 1947 to 1950 inclusive, nor did he owe substantial taxes for said years. This should certainly and lawfully overcome the presumption of correctness of the respondent's determinations, as does the respondent's own witnesses' testimony in the criminal trial used herein.

As to Petitioner M. Lois Corson.

It is contended that she is lawfully entitled to the deduction items disallowed her and to be debited with the dividend income reported by her. She testified the securities held by her on which she reported dividends were owned by her and not by her brother Harry J. Alker, Jr. She produced two books containing all of her dividends received for 1948 and 1950 (Ex. P-29 and P-30).

Mr. Rhoads testified that he prepared her tax returns for 1948 and 1950 and computed her depreciation schedule, which he considered correct and proper.

The Court can take judicial notice that in these and those days of vandalism it is and was necessary, if possible, to keep a house occupied, even if it is held for rent or sale, for its safety and conservation. Also that the Villanova house being used for business rental purposes she is entitled to a proper depreciation allowance.

Wherefore it is contended she is entitled, at least, to the disallowed depreciation and caretaker items (R. 224a).

As to the respondent's allegations of Mrs. Corson holding stock in her name for her brother, Harry J. Alker, Jr., she has denied the same and it is submitted such allegations are founded only on suspicion and conjecture, and not by competent evidence.

As to Marion Alker.

She contends that her tax returns for years 1948 and 1950 should be accepted as filed. That the respondent's case is based on suspicion and conjecture and not competent evidence.

Penalties for Failure to File Estimates and 1946 Return.

The respondent has determined that the petitioner did not file declarations of estimated tax for years 1947 to 1950, inclusive, and a tax return for 1946.

Horace Rhoads testified that a tax return for 1946 was filed by Mr. Alker; also that declarations of estimated tax were filed for each of the years involved herein; that they were always filed with the return; that he understood, if extensions were granted, you didn't have to file them until the extended date (R. 212a-213a).

Petitioner submits it is possible that these declarations could have been indexed improperly by the Internal Revenue Service as well as his 1946 tax return. Petitioner testified in the criminal trial that to the best of his memory, he filed a 1946 return, and the penalties should not be assessed against him.

Fraud and Deficiencies.

The Tax Court's findings of fact and conclusions of law are clearly erroneous within the meaning of Rule 52(a) Federal Rules of Civil Procedure; there was not substantial evidence to support the Tax Court's findings including fraud, upon the disputed facts herein; and which findings work a clear injustice upon the petitioners.

Petitioner contends the Tax Court clearly erred in:

(a) In finding petitioner's original books and records were not produced at trial or offered in evidence, and that they were entirely incomplete and inadequate to establish his correct income or expenses. (Mr. Linsalata testified to the contrary.)

(b) In using respondent's determination as evidence when no proof of same was introduced into evidence and they were contested and contradicted by petitioner. (No Government witness testified.)

(c) In including in petitioner's income dividend and interest income belonging to his sisters, Lois and Marion.

(d) In finding the Freihofer Baking Company stock received from Sarah Freihofer had a value of $510.00 per share, and charging petitioner with having received $102,000 therefrom; (Contrary to Orphans' Court finding). And in finding the 200 shares of Freihofer stock given to Mr. Alker on account of his fee had a value of $510 per share when the government had agreed in the criminal case it had a value of $200.00 per share as that was the value put on it by the Orphans' Court.

(e) In finding petitioner, in each of the years 1947 through 1950, deliberately failed to report substantial amounts of income which he had received and part of each deficiency was due to fraud with intent to evade tax. (Intent to evade has not been proven.)

(f) In finding that petitioner's evidence was generally entirely inadequate to overcome the presumptive correctness of respondent's determinations. (Grossly in error.) (Contrary to the record.)

(g) In charging petitioner with having received additional income of $92,206.00 in 1950 from the Estate of Winfred S. Hurst. (Entirely disproved by petitioner.)

(h) In determining petitioner filed false and fraudulent income tax returns for years 1947 to 1950 inclusive, with intent to evade and defeat tax. (No fraud or intent proven.)

(i) In regarding petitioner's criminal conviction of willfully attempting to evade taxes by filing false and fraudulent returns for the years 1947 to 1950 inclusive, as compelling evidence requiring its ultimate determination that petitioner filed false and fraudulent income tax returns for those years with intent to evade tax and that a part of the deficiency for each of such years was due to petitioner's conscious and deliberate fraud.

(j) In finding petitioner's accountant (Mr. Linsalata) testified his records were incomplete and indefinite and that his summaries were based in part on his own conjectures and conclusions.

To the contrary, Mr. Linsalata testified that of the years 1947 through 1950, he had adequate records, except possibly for the year 1949.

Also, Mr. Vosselman's summarization was based upon what testimony and exhibits he wanted to believe and which were favorable to the Government. The Criminal Court found his summaries, conjectures and conclusions to be lawful and proper enough to convict petitioner (See Tr. 65, 68, 69, 70).

(k) In not making specific findings of fact as requested by petitioner, particularly as to its Sarah Freihofer stock "transactions", the treatment of the Hurst Estate checks; and that Mr. Alker's Constitutional rights had been invaded.

Petitioner contends and claims that there is not sufficient credible and competent testimony in the record to prove respondent's determinations of tax and fraud for the in-

volved years. That petitioner has produced into evidence a preponderance of competent evidence to overcome the presumption of correctness of respondent's determination.

The Tax Court has clearly erred as provided in Rule 52(a) Federal Rules of Civil Procedure, in its holding of fraud and in finding Mr. Alker's conviction a compelling reason for doing so. An allegation of fraud is a serious matter; it is never presumed and must be proven by the respondent by clear and convincing evidence. Title 26, U. S. C. A. Section 1112 (I. R. C. 1939). Fraud is never imputed or presumed and the Courts should not sustain findings of fraud upon circumstances which, at the most, create only suspicion. To adopt the Tax Court's position in this case would, in effect, nullify those well established principles in tax fraud actions and would permit the Commissioner to assess fraud penalties with or without substantial basis, and with no obligation to prove them. See *United States v. Thompson*, 279 F. 2d 165.

Arlette Coat Co., Inc., 14 TC 751, Dec. 17, 629,
Schwartzkoff v. U. S., 246 F. 2d 731,
William J. Powers, Jr., 31 P-H Tax Court Memo 18, 24 (1962),
W. A. Shaw, 27 TC 561-569 (1956), aff'd 252 F. 2d 681.

Merten's Vol. 9, Section 50.61, pages 154 and 155 states ". . . The rule, however, is well settled that when the proof shows that the Commissioner's determination was wrong, the taxpayer need not show the exact amount of the tax that might lawfully be assessed against him. Under such circumstances the presumption disappears and the Commissioner has the burden of proving the existence and amount of deficiency. The Tax Court's determination must then rest on all of the evidence introduced and its ultimate determination must find support in credible evidence. . . ."

Cited cases are *Wodehouse v. Comm.*, 177 F. 2d 881 (CA 2-1949), aff'd revd. and remanded in part 178 F. 2d 987 (CA 4th, 1949), on remand 15 TC 799 (1950), following *Taylor v. Helvering*, 293 U. S. 507, 515-516, 79 L. Ed. 623, 55 S. Ct. 287 (1935); *Gruber v. Comm.*, 315 F. 2d 723; *Federal Natl. Bank of Shawnee v. Comm.*, 180 F. 2d 494 (CA 10th, 1950) revg. and remanding T.C. Memo of Dkt. 15342 (1949).

Royal Highlander v. Comm., 138 F. 2d 240 (CA 8, 1943);

Cohen v. Comm., 266 F. 2d 5;

Harf v. Comm., 263 F. 2d 139;

Weir v. Comm., 283 F. 2d 675;

Miller v. U. S., 296 F. 2d 457;

Welch v. Comm., 297 F. 2d 309.

and, on page 157 thereof, it states, ". . . Where the Commissioner's determination of deductions has been shown to be erroneous it cannot be supported merely because the taxpayer has failed to produce proof of the precise amount of the deduction to which he is entitled.

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing Court on the entire record or evidence is left with the definite and final conviction that a mistake has been committed.

Reviewing courts regard themselves as free to substitute their own findings for those of the Tax Court in such matters as intent, motive and even value:

Est. of Gillette v. Comm., 182 F. 2d 1010;

Belyea v. Comm., 206 F. 2d 262 (3rd Cir.);

Carlton v. Comm., 190 F. 2d 183;

Orris v. Higgins, 180 F. 2d 537;

Loesch & Green Constr. Co. v. Comm., 211 F. 2d 210;

Sommers v. Comm., 195 F. 2d 680;

Comm. v. Transport, 176 F. 2d 570;

Est. of Inman v. Comm., 203 F. 2d 679.

"Where the evidence is partly oral and the balance is written or deals with undisputed facts, then the reviewing Court may ignore the trial Judge's findings and substitute its own."

U. S. v. United States Gypsum Co., 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525.

Under the circumstances and evidence as set forth above, there can be no question that the "ends of justice" have not been properly met and it is within this Court's province to prevent a miscarriage of same. The record clearly shows that Mr. Alker relied upon Mr. Rhoads as to his accounting ability and in preparing correct tax returns.

"Findings must be set aside if the Court is left with the impression that the result is not the truth and right of the case." *W. R. B. Corp. v. Geer*, 313 F. 2d 750.

"An intent or purpose to evade tax is essential." *Est. of Louis Binden*, 11 T. C. 1095.

Petitioner submits that the Tax Court's action works a clear injustice upon the taxpayers, and it is clearly unfair and arbitrary. That the force and effect of its testimony and evidence herein, considered as a whole, are so clearly convincing towards petitioners that the Tax Court's findings are so against the great preponderance of the credible testimony that they do not reflect or represent the truth and right of the case. From a careful review of the record, only one conclusion can be reached and that is the Tax Court's major findings and conclusions are not supported lawfully.

Assuming for the purposes of this petition (but not agreeing to), that the Court of Appeals opinion was correct in all respects save those points mentioned herein, the decision of the Tax Court should have been affirmed only in the amount of $185,386.57 as evidenced in petitioner, Harry J. Alker's criminal trial, modified however by the stipulation

pertaining to the rearrangement of the receipt of the Freihofer Baking Company's stock by said petitioner from Mrs. Sara Freihofer, and subject to the difference between the indictment figures of tax for year 1950 and Mr. Vosselman's computation.

As was shown to this Court of Appeals the Commissioner of Internal Revenue, at the civil tax Tax Court hearing, did not produce to the Court any evidence to prove the deficiencies described in his statutory notice of deficiency (90-day letter), but rested his case on the evidence contained in the criminal trial of petitioner which was stipulated to as being part of the civil trial.

In the Tax Court's decision pertaining to petitioner, Harry J. Alker, Jr., it found the following additional taxes to be due by him for the designated years, to wit (following the statutory notice):

	Tax Court Decision Additional Taxes
1947	$70,591.85
1948	$55,241.13
1949	$223,143.80
1950	$54,053.85
	$403,030.63

The Summary of Net Income and Tax Liability as found by the Government in the criminal case (reflected in Stipulation of Counsel, *U. S. A. vs. Harry J. Alker, Jr.*, No. 12313, this Court of Appeals, pages 17-18), discloses the additional taxes to be $185,386.57.

Civil Tax	$402,990.63	
Criminal Tax	185,386.57	
Difference	$217,604.06	(Unsubstantiated by Commissioner)

The Court's attention is drawn to the statement made by respondent's counsel before the Tax Court at one of its hearings, which states,

> "Now most of the money involved comes from the years covered by the criminal case. It is expected that the records of Mr. Alker were in such condition at the time of the criminal case that he should have been ready in that case as well as the civil one. There really isn't any difference in the amounts for those years. The extra money comes from penalties and interest, according to my recollection, and the exhibits and evidence in this civil matter for the larger years are exactly the exhibits and evidence that are in the criminal matter.* * *"

This certainly indicates and evidences the fact that the Commissioner was solely relying on the figures computed in the criminal trial for his civil tax figures, and not those contained in his statutory notice which he could not and did not prove. Petitioner still claims and contends that he overcame, with sufficient competent evidence the correctness of the respondent's determinations. Also that the presumption was overturned and upset by the respondent's presenting the criminal trial figures as the correct figures for the civil case.

Further, in the criminal case, the Government accepted the figure and value of $40,000.00 (it having been approved by the Philadelphia Orphans' Court) for the 200 shares of Freihofer Baking Company stock given to Mr. Alker as a

part payment of his fee in 1949. However, and to the contrary, the respondent in his statutory notice of deficiency charged Mr. Alker the value of said stock as being $102,000.00, giving the individual share a value of $510.00 instead of $200.00 which the Government gave it in the criminal trial, making a difference of $62,000.00. Following herein, is a copy of a letter dated October 16, 1963, from the Regional Counsel, Internal Revenue Service, addressed to counsel for petitioner, which explains the same.

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
REGIONAL COUNSEL
Fourth Floor
2 Penn Center Plaza
Philadelphia, Pa. 19102

SEAL

Office of CHIEF COUNSEL

In Reply Refer to
CC:PHI:TC
SPC

Oct. 16 1963

Robert M. Taylor, Esquire
Land Title Building
Philadelphia 2, Pennsylvania

In re: Harry J. Alker, Jr.
Norristown, Pennsylvania
Docket No. 60425

Dear Mr. Taylor:

Receipt is acknowledged of your letter dated October 11, 1963, handed by you on October 14, 1963, to Mr. Stephen P. Cadden, of this office, in Court Room No. 2, Post Office Building, Camden, New Jersey, and wherein you request our breakdown relative to certain fees paid to Harry J. Alker, Jr.

The fee amounts to which you refer appear to be items comprising part of adjustments to net income shown in the statutory notice of deficiency dated September 16, 1955, and covered by the revenue agent's report dated May 21, 1953.

As you were advised over the telephone on Wednesday morning, October 16, 1963, by Mr. Cadden, there is no item in 1948 for $25,000.00 but there is an item for $25,500.00 which is probably the item you have in mind. Also, in 1949, there is no item for $63,000.00 but there is an item for $62,000.00. Also, there is no item for $31,000.00 in 1948 but there is such an item in 1949.

Incidentally the items in 1949 for $40,000.00 and the aforesaid item of $62,000.00 pertain to the Estate of William Freihofer, Deceased, and not to Sarah Freihofer.

The proposed Stipulation of Facts, Part VI, Exhibit AD, page 4, should be changed accordingly. This is the proposed stipulation which was forwarded to Raymond J. Bradley, Esquire, petitioner's counsel of record, on October 26, 1961, dealing primarily with items of income and expenditures pertaining to the calendar year 1949 and relative to which advice was requested by respondent as soon as possible but as to which no word has been received up to the present.

As to 1947 item of $4,000.00

This item is a check by Sarah Freihofer, dated December 28, 1946, drawn on the Provident Trust Company, Philadelphia, to order of Harry J. Alker, Jr., in the amount of $4,000.00 relating to fees paid to Harry J. Alker, Jr., and cashed by Harry J. Alker, Jr., on March 17, 1947.

As to 1948 item of $25,500.00

This item represents 50 shares of Freihofer Baking Company common stock, the fair market value of which was $510.00 per share, a total of $25,500.00, and which is treated

in the revenue agent's report. The said stock was in payment of legal services. In a letter to respondent from Harry J. Alker, Jr., dated November 12, 1952, petitioner stated that Sarah Freihofer paid him for services in connection with her various returns and taxes, in 1948, 50 shares of Freihofer Baking Company common stock. Petitioner valued the stock in the said letter at $200.00 per share. Petitioner failed to include any amount as representing the said 50 shares of stock received by Harry J. Alker, Jr., from Sarah Freihofer in his income for 1948.

As to 1949 items of $31,000.00 and $20,000.00

These items represent 100 shares of Freihofer Baking Company common stock at the fair market value of $510.00 per share, a total of $51,000.00. The shares are so treated in the statutory notice of deficiency dated September 16, 1955, and the revenue agent's report dated May 21, 1953. In the letter of November 12, 1952, petitioner states that Sarah Freihofer paid him for services in connection with her various returns and taxes, in 1949, 100 shares of Freihofer Baking Company common stock. Petitioner valued these said shares at $200.00 per share. For 1949 petitioner reported $20,000.00. Respondent determined that the said fair market value of the shares was understated in 1949 by $31,000.00. The mathematics are as follows:

100 shares at $510.00 per share	$51,000.00
Included in reconciliation of receipts	20,000.00
Additional fees	$31,000.00

As to 1949 items of $40,000.00 and $62,000.00

In addition to the cash fees received from the Estate of William Freihofer, Deceased, petitioner received in 1949 from the Estate legal fees represented by 200 shares of Freihofer Baking Company common stock. Respondent

determined the fair market value of the said 200 shares to be $510.00, a total of $102,000.00. The said shares are so treated in the statutory notice of deficiency dated September 16, 1955, and in the revenue agent's report dated May 21, 1953. Petitioner caused these shares to be registered in the names of his sisters, Marion Alker and M. Lois Corson, 100 shares each on August 12, 1949. Petitioner included the amount of $40,000.00 (200 shares at $200.00 per share) in the list of fees submitted to respondent with his reconciliation of receipts for 1949. Respondent, however, had determined that the fair market value of the said shares was $510.00 per share and adjusted the value accordingly. The mathematics are as follows:

200 shares at $510.00 per share	$102,000.00
Included in reconciliation of receipts	40,000.00
Additional fees	$ 62,000.00

As to 1950 item of $15,500.00

This item represents 50 shares of Freihofer Baking Company common stock at the fair market value of $510.00 per share, a total of $25,500.00. Petitioner received the said 50 shares from Sarah Freihofer for services rendered. The item is so treated in the statutory notice of deficiency dated September 16, 1955, and also in the said revenue agent's report dated May 21, 1953. Petitioner included $10,000.00 in his list of fees submitted with his reconciliation of receipts for 1949 in respect to this stock. In the letter addressed to respondent dated November 12, 1952, petitioner states that Sarah Freihofer paid him for services in connection with her various returns and taxes, in 1950, 50 shares of Freihofer Baking Company common stock. Petitioner valued the said shares at $200.00 per share. The figures as to the situation are as follows:

50 shares at $510.00 per share	$25,500.00
Included in reconciliation of receipts	10,000.00
Additional fees	$15,500.00

The foregoing information completes the breakdown of all requested items.

Very truly yours,

CECIL H. HAAS,
Regional Counsel.

Mr. Linsalata testified to his examination of taxpayer's books and record, which he termed adequate, and summarization of same.

Horace S. Rhoads (now deceased), his regular accountant and preparer of his tax returns testified he was present when Mrs. Sara Freihofer and petitioner met and Mrs. Freihofer agreed to pay Mr. Alker $40,000 for his legal work and turned over the "Freihofer stock certificates to him" in 1951.

Mr. Rhoads also testified that he was the person who handled the Hurst Estate transactions and transferred the cash to estate safe deposit boxes and then later purchased Federal Government securities as directed by decedent's will.

Therefore, if the revaluation by the Revenue Agent of the 200 shares of Freihofer stock paid to Mr. Alker as a fee in 1949, which in the criminal trial was valued at $40,000 but by the same agent in the civil case at $102,000; and the difference in the Sara Freihofer stock; and the Hurst Estate moneys were deleted from the case, $62,000 plus $62,000 plus $90,206.49 totalling $214,206.49, there is nothing substantial in the case to prove fraud.

The criminal case computation for 1949 additional taxes is only $3686.46 according to Frank Vosselman's figures.

The remaining items are technical items and use of tax accounting methods.

It may be that in the criminal trial it was shown that various items of income were admitted by petitioner, but it is contended that the civil tax case should be based upon the fact whether he failed to report any substantial amount of tax for any one year of those involved herein.

Also, it should be borne in mind that Mr. Alker was a sick man during his criminal trial and was not well enough to attend most of the trial. Also, that his counsel therein, and as a result thereof, was not able to prepare a proper defense for him.

As to petitioner being charged with placing dividends of stock in his sister's (M. Lois Corson) tax return, it should be noted that both he and she testified that she had loaned him large sums of money from 1942 on (after her husband had died); so her money was available for the purchase of said stock. Petitioner did what a lot of other professional men and business men do and that is to have others place their stock in that person's name to permit him to advance himself with those companies business-wise.

Further, petitioner has discovered further evidence that Sara Freihofer did not turn over the said Freihofer stock to Mr. Alker until sometime after January 27, 1951, and that her 1949 and 1950 income tax returns, in which she had claimed deductions for a fee of $20,000 paid to Mr. Alker in 1949 and for $10,000 paid him in 1950, were examined by the Internal Revenue Service. This information was not available at the time of trial and just came to light.

Still further, petitioner has had a search made of the records of the Orphans' Court of Montgomery County, Pennsylvania, pertaining to the Winfred S. Hurst Estate. These records indicate that the Orphans' Court Judge, Hon. E. LeRoy Van Roden, as a result of a petition having been

filed to remove Mr. Alker as Trustee, on July 13, 1956, entered an order directing that Mr. Alker was to continue as Trustee and the Broad Street Trust Company was appointed as Co-trustee. That the Judge further directed Mr. Alker to file an account of his administration of his Trust by August 8, 1956, so that his account could be audited at the September Audit List 1956, which was done. That the account as Trustee shows the following:

Principal Receipts	$100,000.00	
Principal Disbursements	None	
		$100,000.00
Income receipts	9585.13	
Income disbursements	364.41	9,220.72
		$109,220.72
Amount distributed		48,125.44
Balance on hand		$61,095.28

A balance of $61,095.28 consisted of the following:

$41,000.00 U. S. Treas. 2 one-half's 72	$40,040.00
4,500.00 U. S. Treas. 2 three-quarter's 67	$ 3,581.71
Savings account, Liberty Fed. S. & L. Assoc., Phila.	$ 8,451.45
Security Trust Co., Pottstown, Pa., savings account	$ 8,450.16
Checking account, etc.	571.96
Balance undistributed	$61,095.28

The $48,125.44 consisted, mainly, of payments to a sanitarium and doctors' bills for Mrs. Annie Hurst.

By an adjudication by the Orphans' Court, the balance, after additional credit was given to other lawyers as coun-

sel fees, was ordered to be turned over to Harry J. Alker, Jr., and the Broad Street Trust Company as Trustees. That a Court Examiner had been appointed by the Orphans' Court who reported that all of the assets were intact and were turned over to the Broad Street Trust Company who had possession of same.

The records also show a final account was filed by said Trustees, approved by the Court, and complete distribution was then ordered and made.

U. S. v. Kavanagh, 308 F. 2d 824.

Revenue agent Segal testified he first met with Mr. Alker on May 3, 1950, and special agent Mednick testified he got into the case in the Summer of 1950.

With this fact in mind, it is hard to believe that when petitioner filed his 1949 and 1950 tax returns in February, 1952, when their examination was being conducted, he did so with a fraudulent intent to evade tax. It appears that they were, at the most, carelessly prepared as were the 1947 and 1948 returns.

The record as a whole certainly indicates that Mr. Alker depended entirely on Mr. Rhoads to handle his accounting work and to prepare proper tax returns for the years involved, which should clearly relieve him of the question of fraud.

If fraud is not proven by respondent, the years involved are barred by the statute of limitations on assessment and collection, Section 275(a), where he can prove petitioner executed proper waivers or failed to report more than 25% of his gross income. (See Sections 276(a), 275(a) and (c) respectively of Title 26 U. S. C. A. (Internal Revenue Code of 1939.)

III. The taxpayer's prior criminal conviction for willfully attempting to evade and defeat a tax does not collaterally estop him from challenging the imposition of civil fraud penalties proposed to be assessed against him for those same years.

IV. The Tax Court may not properly invoke the doctrine of collateral estoppel and the Court of Appeals should have so found.

In the instant case, the Tax Court has found that Mr. Alker's criminal conviction under Section 145(b) of the Internal Revenue Code of 1939 (Title 26 U. S. C. A.), as compelling evidence requiring its ultimate determination in the proceedings that petitioner filed false and fraudulent income tax returns for the years involved with intent to evade tax and that a part of the deficiency for each of such years was due to petitioner's conscious and deliberate fraud. It cites the cases of *Stagecrafters' Club of District of Columbia Division of American Legion,* 111 F. Supp. 127 (D. C. 1953); *Abraham Galant,* 26 T. C. 354 (1956). Compare *John W. Amos,* 43 T. C. 50 (1964); *Arctic Ice Cream Co.,* 43 T. C. 68 (1964).

This finding appears contrary to the facts of the instant case. The Tax Court in its opinion points out and refers to facts and conclusions contained in the criminal case and bases much of its findings on facts elicited therein. Not only that but the Government insisted and stipulated that the record of the criminal case become part of the civil case.

It appears therefore that the Tax Court did not necessarily rely totally upon the doctrine of collateral estoppel as proof of civil fraud, since it permitted evidence in the record; i.e., the transcripts of the criminal proceedings.

Although the Tax Court has been known to raise ques-

tions of its own motion, it cannot "by surmise" supply deficiencies in pleadings and will generally not consider issues not placed before it in the pleadings.

Minnesota Tea Co. v. Comm., 76 F. 2d 797, aff'd 296 U. S. 378, 80 L. Ed. 284, 54 S. Ct. 269,
Friednash v. Comm., 209 F. 2d 601,
Buffalo Wills—St. Claire Corp., 2 B. T. A. 364,
Standard Galvanizing Co. v. Comm., 202 F. 2d 736,
Warren v. Baird, 42 B. T. A. 970,
Sicanoff Vegetable Oil Co., 27 T. C. 1056.

Collateral estoppel is an affirmative defense which must be raised in the pleadings.

Arthur D. Thomson, 42 T. C. 824,
Arlington F. Brown, 24 T. C. 256.

Here in the instant case no such theory was pleaded or brought into the case in any manner except in the Court's opinion.

Sicanoff, above, cited,
Prather v. Com., 322 F. 2d 931,
Robert E. Rushing, 214 F. 2d 383,
Helvering v. Salvage, 297 U. S. 166,
Comm. v. Chelsea Products, 197 F. 2d 620 (3rd Cir.).

In the instant case there are new parties involved therein consisting of petitioner's two sisters, and new facts and evidence that were not presented in the criminal Court trial. The alleged evaded taxes in the civil case of Mr. Alker are much greater than those alleged in the criminal trial; to wit:

Year	Criminal Case	Civil Case
1947	$49,133.35	$ 70,591.85
1948	32,276.75	55,241.13
1949	36,853.03	223,143.80
1950	43,498.04	54,053.85

The difference in these figures certainly indicates there were other and new matters contained in the civil case that were not included in the criminal case.

See Petitioner's Motion to Vacate or Revise Decisions and For Rehearing under Tax Court Rule 19(f).

It is submitted to this Court that if a Court (as did the Tax Court) decide to correct what it considered an error in prior holdings it should do so in a manner similar to that done by the Supreme Court of the United States in *James v. United States*, 366 U. S. 213, 81 S. Ct. 1052, when it corrected its *Wilcox* decision (*Comm. v. Wilcox*, 327 U. S. 404). The Court stated therein, inter alia, ". . . We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed. Therefore, we feel that the petitioner's conviction may not stand and the indictment against him must be dismissed . . ."

In other words, it is claimed that the Tax Court should have given petitioner advance warning of its change of thinking as to proof of fraud and put him on notice thereof so that he could prepare his case accordingly; or else the Tax Court in one of its decisions should have announced a time limit such as the Supreme Court did in *James*, if the collateral estoppel theory as applied is finally found proper.

Under the 1939 Code and 1954 Code, a criminal conviction of "willful evasion" can never be collateral estoppel on the

issue of fraud in the income tax civil proceeding. Congress has precluded the application of collateral estoppel by deliberately using the term "willful evasion" in the section applicable to criminal proceedings, and fraud in the section applicable to civil income tax proceedings. In considering this very problem in *Helvering v. Mitchell*, 303 U. S. 391 (1938), the Supreme Court quoted with approval the following statement:

"A careful study of the two sections convinces us that they are basically different in character, and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof" (p. 404).

The Supreme Court squarely held that "fraud" was not essential to a conviction of "Willful evasion" in *United States v. Scharton*, 285 U. S. 518 (1932), and *United States v. Grainger*, 346 U. S. 235 (1953), does not even mention this problem, but rather is a general discussion of fraud under the False Claims Act and the Suspension Act.

In 1954, Congress specifically refused to eliminate this distinction. The statutory and legislative history of these sections is a compelling argument against the *Amos* case.

The ends of justice would not be served by the application of collateral estoppel in this case. Here we have had two trials and it is contended petitioner has proven that he was not fraudulent. This ground alone requires that collateral estoppel not be applied to years 1947 through 1950.

Collateral estoppel is a rule of expediency which is and should be flexible, and sparingly applied in tax cases. *Comm. v. Sunnen*, 333 U. S. 591 (1948); *United States v. Consolidated Edison Company*, 366 U. S. 380 (1961), affirming 279 F. 2d 1952 (2nd Cir. 1960); *General Motors v. U. S.*, 142 Ct. C. I. 842 (1958); *Engineers Club of Phila. v. U. S.*, 95 Ct. C. I. 42, 53, 54 (1942), cert. denied 316 U. S. 70. The

rule has never been blindly followed when it would clearly defeat justice, as it would, in this case.

The petitioner submits that a criminal conviction of willful evasion of taxes under Section 145(b) could never be collateral estoppel on the issue of fraud under Section 276(a) and 293(b) of the 1939 Code.

The exact language of Sections 145(b), 276(a), and 293(b) are important because Congress intentionally worded them differently. The crime under Section 145(b) is willful attempt to evade or defeat any tax, whereas the statute of limitations is raised under Section 276(a) if a "fraudulent return" with intent to evade tax is filed, and the fraud penalty is imposed under Section 293(b) if any part of the deficiency "is due to fraud" with intent to evade tax.

That Congress made and still considers "willful evasion" and "fraud" two separate issues and intended the statute of limitations to apply to income tax civil proceedings involving willful evasions is clearly, if not conclusively, established by a comparison of 276(a) with sections 1635(b) and (c), 3312(b) and (c), and 145(b) of the Internal Revenue Code of 1939. It is immediately seen that sections 276(a), 1635(b), and 3312(b) cover fraud and are identical. It is seen that Sections 1635(c) and 3312(c) cover willful evasion and are identical. Also, the pertinent language of Section 14(b) is identical to Section 1635(c) and 3312(c). Further, Section 276, relating to income tax civil proceedings, contains no reference to willful evasion. Sections 145 and 276 apply to income taxes, and section 3312 applies to miscellaneous taxes. If fraud and willful evasion were intended to be synonymous or for one to include the other, then either Sections 1635(b) and 3312(b) or Sections 1635(c) and 3312(c) were absolutely meaningless. Obviously, Congress intended all four sections to have meaning.

The purposes, procedures, proceedings, and effect of Sections 145(b), 276(a), and 293(b) are different. One is to

punish, whereas the other two are to collect revenue. The criminal offense had a three-year, and now has a six-year statute of limitations, whereas fraud has none. Proof of the exact amount of tax is unnecessary to a conviction of willful evasion but essential to the assessment of a fraud penalty. (*Mitchell v. Helvering*, 303 U. S. 391).

The Supreme Court has squarely and specifically held that fraud and willful evasion are two separate wrongs, and that fraud is not a necessary ingredient of, and is not essential to, a determination of willful evasion (*United States v. Scharton*, 285 U. S. 518 (1932); *United States v. Noveck*, 271 U. S. 201, 203.

The Tax Court had the estoppel question before it many times and, until recently, had consistently held that the conviction is not conclusive, but was only evidence which may be explained. *Vassalo v. Comm.*, 23 T. C. 656, 660 (1955); *Safra v. Comm.*, 30 T. C. 1026, 1034-1035 (1958); *Powers v. Comm.*, 62,005 P-H Memo T. C. 62-26; *Estate of Slater v. Comm.*, #62,256 P-H Memo T. C. 62-1539; *Hendrick v. Comm.*, #61308 P-H Memo T. C. 61-1736; *Williams v. Comm.*, #55325 P-H Memo T. C. 55-1075; *McLaughlin v. Comm.*, 29 B. T. A. 247, 249 (1933). Other taxpayers, when given an opportunity to do so, were able to show no fraud, notwithstanding the conviction of willful evasion. See *Hendrick, Powers* and *Wilson*, supra, and *LeRoy B. Williams*, 208 F. 2d 437 (3rd Cir.).

The Court's holding in *Tomlinson v. Lefkowitz*, 334 F. 2d 262 (5th Cir. 1964), is wrong and is contrary to a long line of decisions of the Tax Court reaching back to 1933. It is contrary to the express holdings in the *Scharton* and *Noveck* cases and the clear intention of Congress expressed in the statutes and legislative history.

After the announcement of the *Tomlinson* decision, the Tax Court, with vigorous dissents, made an about-face and followed it in *Amos v. Comm.*, 43 T. C. 50 (1964), and *Arctic*

Ice Cream Co. v. Comm., 43 T. C. 68 (1964). We also now have the *Moore* case and *Armstrong* case following them. These cases are distinguishable with *Alker* in that he has had his two trials and proven he was not guilty of civil fraud, and the *Tomlinson, Amos* and *Arctic Ice* cases involved non-tax statutes, most of which involve identically worded criminal and civil statutes or the same section of the one statute.

Judge Withey in his dissenting opinion in the *John W. Amos Case*, 43 T. C. 50, 61, 63 said, "It seems clear that a taxpayer might very well willfully avoid payment without being guilty of the fraudulent intent envisaged by Section 6653(b)". See *Frank Palermo*, 259 F. 2d 872; *U. S. v. Pechenik*, 236 F. 2d 844.

The use of collateral estoppel in the instant case causes an injustice to petitioner inasmuch as the civil case has been heard and the criminal record has been put into its record. There is no justification for the doctrine being used therefore as it cannot save judicial time by precluding relitigation of previously determined issues.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari be granted.

ROBERT M. TAYLOR,
Attorney for Petitioners.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15,840.

HARRY J. ALKER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

(T. C. Docket No. 60425)

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

PRESENT:
McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

ATTEST:
IDA O. CRESKOFF,
Clerk.

December 8, 1966.

Judgments are the same for
M. Louis Corson and Marion Alker.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 15836-15840.

No. 15836.

M. LOIS CORSON,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15837.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

M. LOIS CORSON,
Respondent.

No. 15838.

MARION ALKER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15839.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

MARION ALKER,

Respondent.

No. 15840.

HARRY J. ALKER, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES.

Argued November 15, 1966.

Before: McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed December 8, 1966.)

Per Curiam.

These are three petitions for review of decisions of the Tax Court. The main suit, #15840, is against Harry J. Alker, Jr. The other two petitioners, Mrs. Corson and Miss Alker, are sisters of Mr. Alker. Those petitions, #15836 and #15838, while closely related to #15840, are separate matters. The Commissioner has filed protective contingent cross petitions in both #15836 and #15838 for use in the event we disagree with the decisions of the Tax Court regarding them.

The Tax Court found that Mr. Alker had failed to file a tax return for 1946; that he filed delinquent returns for 1947, 1949 and 1950; that there were substantial deficiencies in his returns for 1947, 1948, 1949 and 1950. Fraud penalties on the returns imposed by the Commissioner under Section 293(b) Internal Revenue Code of 1939 were upheld. Penalties were assessed on all five years for not filing estimates of income. A tax deficiency for 1946 was found together with a 25% delinquency for that year.

The foundation of the Tax Court's findings of fraudulent deficiencies in taxpayer's returns for 1947 to 1950 inclusive was his 1958 conviction in the United States District Court for the Eastern District of Pennsylvania of wilfully attempting to defeat and evade federal income taxes by filing false and fraudulent returns for said years. This Court affirmed that conviction, United States v. Alker, 260 F. 2d 135 (3 Cir. 1958). Certiorari was denied, 359 U. S. 906 (1959), rehearing denied, 359 U. S. 950 (1959). The full record of those criminal proceedings by stipulation of the parties was put into evidence during the Tax Court trial.

Argument on behalf of petitioner before us has obviously been sincerely and competently prepared and presented. Both sides agree that the fundamental problem is whether there is substantial evidence to support the income tax deficiencies and the tax additions because of fraud, found by the Tax Court.

From our recheck of the voluminous criminal trial record we are satisfied that there was sufficient evidence of substantial understatement of income; sufficient evidence of the wilfulness element in the above mentioned fraud statute and of the non filing of the 1946 return. We directly hold that there was ample proof before the Tax Court for the latter to find as it did that:

> "Our own review of all of the evidence in the record before us leaves no doubt in our minds that respondent has carried his burden of proving fraud herein by clear and convincing evidence and that a portion of the deficiency found by the respondent in each of the taxable years 1947 through 1950 is due to fraud with intent to evade tax."

Because of our above stated view, there is no need at this time of passing upon the Commissioner's alternative argument that collateral estoppel should be applicable to the taxpayer in the present circumstances.

Specific attack is made on the Commissioner's evaluation of 200 shares of stock paid petitioner for legal services. That whole question was developed at length in the criminal trial. A United States Treasury expert properly qualified to testify. In his judgment the stock in the critical year was worth $510 a share. There was some evidence on behalf of the taxpayer that the evaluation at that time was $200 a share. The judge gave the conflicting estimates to the jury for its decision. The Tax Court accepted the view of the Treasury witness which it had every right to do.

The other large item especially disputed by taxpayer is

the amount of the fee he received for services to an estate he represented. This also was thoroughly aired at the criminal trial. Checks on the estate amounting to $90,206.49 by taxpayer as executor, made payable to him as a lawyer and endorsed by him were in evidence. Those very checks had been given to the Internal Revenue Service by taxpayer to account for deductions on the estate tax returns. In the face of this and the strong corroborative testimony of the Supervisor of the Federal Estate and Gift Tax Audit Section of the Internal Revenue Service who had been connected with the Federal Tax Return audit of the particular estate, the Tax Court refused to accept taxpayer's statement to the effect that the money from the checks was not kept by him but put into a cash trust fund. The Tax Court was plainly justified in that view.

The deficiencies determined against the other two taxpayers need not be set out at length. The Tax Court allowed Mrs. Corson deduction on her residence for the two years during which, as the Court decided, it had been held for sale. The Commissioner does not contest that conclusion though originally he had disallowed the deduction. Regarding the other deductions claimed by Mrs. Corson and her sister, the Tax Court found with reference to Mrs. Corson that she "* * * has not sustained her burden of proving error in respondent's determination * * *" and concerning Miss Alker, that she "* * * has utterly failed to overcome the presumptive correctness of respondent's determination as to her additional income * * *." There is nothing before us that would permit our disturbing those holdings.

The remaining problem has to do with the allocation by the Commissioner to Mr. Alker of various items reported by his sisters. The Tax Court transcript affords sound ground for that Court's ruling that the Commissioner's al-

locations which it allowed were based on substantial evidence.

The decisions of the Tax Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 15,836, 15,838, 15,840.

M. LOIS CORSON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MARION ALKER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

HARRY J. ALKER, JR.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SUR PETITION FOR REHEARING.

Present: STALEY, Chief Judge and McLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, Circuit Judges.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN,
Judge.

Dated: January 9, 1967.

EXCERPT FROM 90-DAY LETTER.

STATEMENT

(Attached to 90-day letter)

Mr. Harry J. Alker, Jr.
724 Swede Street
Norristown, Pennsylvania
and
Warwick Hotel
17th and Locust Street
Philadelphia, Pennsylvania
and
1505 Land Title Building
Philadelphia, Pennsylvania

Income tax and penalty liability for the taxable years ended December 31, 1942, December 31, 1943, December 31, 1944, December 31, 1945, December 31, 1946, December 31, 1947, December 31, 1948, December 31, 1949, and December 31, 1950.

Year	Deficiency	Additions to the Tax Section 294(d)(1)(A)	Additions to the Tax Section 294(d)(2)	Penalties Section 293(b)	Penalties Section 291(a)
(1942 to 1946, inclusive, deleted)					
1947	70,591.85	7,059.19	4,235.51	35,295.93	17,647.96
1948	55,241.13	5,524.11	3,314.47	27,620.57	
1949	223,143.80	22,678.69	13,607.21	111,571.90	55,785.95
1950	54,053.85	5,405.39	3,243.23	27,026.93	13,513.46
Totals	435,779.68	43,245.71	25,947.42	217,889.86	90,283.92

This determination of your income tax and penalty liability has been made upon the basis of examination of the available records.

Fifty per centum of the total amount of the deficiency, in addition to the deficiency, has been asserted in accordance with the provisions of the Internal Revenue Code of 1939, Section 293(b).

The addition of 10% of the tax for failure to file Declaration of Estimated Tax and the addition of 6% of the tax for underestimate of estimated tax for the years 1943 to 1950, inclusive, have been asserted in accordance with the provisions of Section 294 of the Internal Revenue Code of 1939, as amended.

Inasmuch as you failed to file an income tax return for the year 1946 and your income tax returns for the years 1944, 1947, 1949 and 1950 were not filed within the time prescribed by law, twenty-five per centum of the tax has been added thereto in accordance with the provisions of Section 291(a) of the Internal Revenue Code of 1939.

(Adjustments for 1942 to 1946 are deleted)

ADJUSTMENTS TO NET INCOME 1947

Net income as disclosed by return		($11,238.54)
As corrected		109,185.76
Net adjustment as computed below		$120,424.30
Unallowable deductions and additional income:		
(a) Net Profit from Profession	$109,778.00	
(b) Rental Income	1,212.00	
(c) Dividend Income	5,385.40	
(d) Interest Income	170.99	
(e) Net Capital Gains	4,881.37	
(f) Medical Expense	2,500.00	
Total		$123,927.76
Nontaxable income and additional deductions:		
(g) Interest Expense	$ 3,503.46	
Total		$ 3,503.46
Net adjustment as above		$120,424.30

EXPLANATION OF ITEMS—1947

(a) Net Profit from Profession $109,778.00

The available information discloses that the taxpayer had additional net profit from profession as indicated below:

Net Profit from profession as corrected	$101,341.46
Net loss from profession as reported	(8,436.54)
Adjustment	$109,778.00

(b) Rental Income 1,212.00

The taxpayer failed to include in income rentals received from the subletting of part of his law offices. 5,385.40

(c) Dividend Income

The available information discloses that the taxpayer had dividend income of the above stated amount none of which was reported in his return. 170.99

(d) Interest Income

The available information discloses that the taxpayer had interest income of the above stated amount none of which was reported in his return. 4,881.37

(e) Net Capital Gains

The available information discloses that the taxpayer had net capital gains of the above stated amount none of which was reported in his return. 2,500.00

(f) Medical Expense

Adjustment to medical expense deduction based on change in Adjusted Gross Income:

Adjusted Gross Income as corrected:		
Adjusted Gross Income as reported		(8,436.54)
Increases this report:		
Item (a)	$109,778.00	
Item (b)	1,212.00	
Item (c)	4,826.39	
Item (d)	4,881.37	120,697.76
Adjusted Gross Income as corrected		$112,261.22
Medical Expense non-deductible 5% of $112,261.22		$5,613.06
Medical expenses claimed paid		4,070.00

Medical expense deduction allowable	- 0 -	
Medical expense deduction claimed	2,500.00	
Adjustment	$2,500.00	
(g) Interest Expense		$3,503.46

The available information discloses that the taxpayer paid the above stated amount for interest which is herein allowed as a non-business deduction

COMPUTATION OF INCOME TAX—INDIVIDUAL —1947

1. Net income	$109,185.76	
2. Less: Exemption	1,000.00	
3. Net income subject to tax	$108,185.76	
4. Tentative Tax		$74,605.33
5. Less 5% of line 4		3,730.27
6. Combined Normal Tax and Surtax		$70,875.06
Total Alternative Tax		70,591.85
8. Income Tax liability		70,591.85
9. Income tax liability disclosed by return		- 0 -
10. Deficiency in income tax		$70,591.85
50% Fraud Penalty (Sec. 293(b) I. R. C.)		$35,295.93
Sec. 291(a) Penalty		17,647.96

COMPUTATION OF ALTERNATIVE TAX—INDIVIDUAL—1947

1. Net Income		$109,185.76
2. Net Long-Term Capital Gain	$819.72	
Less: Net Short-Term Capital Loss	- 0 -	819.72
3. Ordinary Net Income		$108,366.04
4. Less: Exemptions		1,000.00
5. Net Income subject to tax		$107,366.04
6. Surtax and Normal Tax on Item 5		73,875.78
7. Less: Partially Tax-Exempt Interest		
8. Tentative Tax		$ 73,875.78
9. Less: 5% of Item 8		3,693.79
10. Partial Tax		$ 70,181.99
11. Plus: 50% of Line 2		409.86
12. Alternative Tax		$ 70,591.85

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax under Section 294(d)(2) of the Internal Revenue Code

Corrected Tax	$ 70,591.85
Less: Withholding Tax Actually Withheld	
Estimated Tax	
Difference	$ 70,591.85
Addition to Tax (6% of above balance)	$ 4,235.51

Failure to File a Declaration of Estimated Tax on Time
Section 294(d) (1) (A)

Corrected Tax	$70,591.85
Less: Withholding Tax Actually Withheld	
Overpayment credit, if any, from a prior year	
Balance to be divided into 4 installments due	$70,591.85
Amount Due—$70,591.85 (No return filed) @ 10%	
Addition to Tax	$ 7,059.19

ADJUSTMENTS TO NET INCOME—1948

Net income as disclosed by return		($10,204.29)
As corrected		95,569.51
Net adjustment as computed below		$105,773.80
Unallowable deductions and additional income:		
(a) Net Profit from Profession	$88,324.74	
(b) Rental Income	1,212.00	
(c) Dividend Income	14,655.70	
(d) Interest Income	662.15	
(e) Net Capital Gains	2,995.07	
(f) Loss from Operations of Rental Property	4,789.10	
(g) Medical Expense	2,500.00	
Total		$115,138.76
Nontaxable income and additional deductions:		
(h) Interest Expense	$9,364.96	
Total		$ 9,364.96
Net adjustment as above		$105,773.80

EXPLANATION OF ITEMS—1948

(a) Net Profit from Profession — $ 88,324.74

The available information discloses that the taxpayer had additional net profit from his profession as indicated below:

Net profit from profession as corrected	$85,686.55
Net loss from profession as reported	2,638.19
	$88,324.74

(b) Rental Income — 1,212.00

The taxpayer failed to include in income rentals received from the subletting of part of his law offices.

(c) Dividend Income — 14,655.70

The taxpayer failed to report dividend income received during the taxable year.

Dividend income received	14,655.70
Reported per return	- 0 -
Adjustment	$14,655.70

(d) Interest Income — $ 662.15

The taxpayer failed to report interest income received during the taxable year:

Interest income received	$662.15
Reported per return	- 0 -
Adjustment	$662.15

(e) Net Capital Gains — 2,995.07

The taxpayer failed to report net capital gains on sale of securities during the taxable year:

Net capital gains	$2,995.07
Reported per return	- 0 -
Adjustment	$2,995.07

(f) Loss from Operations of Rental Property 4,789.10

The taxpayer failed to substantiate loss claimed on operation of rental property:

Loss claimed per return	$4,789.10
Allowed	- 0 -
Adjustment	$4,789.10

(g) Medical Expense 2,500.00

Adjustment to medical expense deduction based on change in adjusted gross income.

Adjusted gross income as corrected:		
Adjusted gross income as reported:		($7,427.29)
Increases this report:		
Item (a)	$88,324.72	
Item (b)	1,212.00	
Item (c)	14,617.10	
Item (d)	662.15	
Item (e)	2,995.07	
Item (f)	4,789.10	112,600.14
Adjusted gross income as corrected		$105,172.85
Medical expense non-deductible:		
5% of $105,172.85		5,258.64
Medical expense claimed paid		4,480.00

Medical expense deduction allowable	-0-	
Medical expense deduction claimed	2,500.00	
Adjustment	$ 2,500.00	
		$9,364.96

(h) Interest Expense

The available information discloses that the taxpayer paid the above stated amount for interest which is herein allowed as a non-business deduction.

COMPUTATION OF INCOME TAX FOR INDIVIDUALS NOT USING TAX TABLE—1948

Net income			$95,569.51
Less: Exemption			600.00
Income subject to tentative tax			$94,969.51
Income subject to tentative tax if separate return; or one-half of such income if joint return			$94,969.51
Tentative Tax			$62,943.47
Less: Adjustment for tax on partially tax-exempt interest			
Balance of tentative tax			$62,943.47
Tax Reduction: Balance of Tentative Tax	Rate (Calendar years 1948 and 1949)	Amount	
$0 $400	17%	$ 68.00	
$400-$100,000	12%	$7,505.22	
Over-$100,000	9.75%		
Total tax reduction			$ 7,573.22
Combined normal tax and surtax			$55,370.25

Multiply amount of combined tax by 2 if joint return	- 0 -
Alternative tax, if applicable	$55,241.13
Balance of income tax liability	$55,241.13
Income tax liability disclosed by return	- 0 -
Deficiency in income tax	$55,241.13
50% Fraud Penalty (Sec. 293(b) I. R. C.)	$27,620.57

COMPUTATION OF ALTERNATIVE TAX—INDIVIDUALS—1948

Income subject to tentative tax if separate return; or one-half of such income if joint return	$94,969.51
Less: Excess of net long-term capital gain over net short-term capital loss:	485.18
(a) If separate return, enter full amount	
(b) If joint return, enter one-half of such amount	
Balance subject to tentative tax	$94,483.33
Tentative Tax	$62,520.50
Less: Adjustment for tax on partially tax-exempt interest	
Balance of tentative tax	$62,520.50

Tax Reduction:

Balance of Tentative Tax	Rate	Amount
$0 $400	17%	$ 68.00
$400-$100,000	12%	$7,454.46
Over-$100,000	9.75%	

Total tax reduction	$ 7,522.46
Combined partial normal tax and surtax	54,998.04
Multiply amount of combined partial tax by 2 if joint return	
Add: 50% of excess of net long-term capital gain over net short-term capital loss in (a), above, if separate return; Full amount in (b), above, if joint return	$ 243.09
Alternative Tax	$55,241.13

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax under Section 294(d) (2) of the Internal Revenue Code

Corrected Tax	$55,241.13
Less: Withholding Tax Actually Withheld	
Estimated Tax	
Difference	$55,241.13
Addition to Tax (6% of above balance)	$ 3,314.47

Failure to File a Declaration of Estimated Tax on Time Section 294(d) (1) (A)

Corrected Tax	$55,241.13

Less: Withholding Tax Actually Withheld	
Overpayment credit, if any, from a prior year	- 0 -
Balance to be divided into 4 installments due	$55,241.13
Amount due—$55,241.13 (No return filed) @ 10% Addition to Tax	$ 5,524.11

ADJUSTMENTS TO NET INCOME—1949

Net income as disclosed by return		$14,975.77
As corrected		308,245.12
Net adjustment as computed below		$293,269.35
Unallowable deductions and additional income:		
(a) Net Profit from Profession	$255,398.75	
(b) Dividends	21,943.55	
(c) Net Capital Gains	5.96	
(d) Loss on Operation of Rental Property	5,541.85	
(e) Medical Expense Deduction	1,250.00	
(f) Interest Expense	9,129.24	
Total		$293,269.35
Net adjustment as above		$293,269.35

EXPLANATION OF ITEMS—1949

(a) Adjusted Gross Income $255,398.75

The available information discloses that the taxpayer had additional net profit from his profession in the amount indicated below:

Net Profit from Profession as corrected	$300,182.96
Net Profit from Profession per return	44,784.21
Additional Net Profit from Profession	$255,398.75

(b) Dividends 21,943.55

The available information discloses that the taxpayer had additional dividend income as indicated below:

Dividend income as corrected	$ 24,949.05
Dividend income as reported	3,005.50
Additional dividend income	$ 21,943.55

(c) Net Capital Gains 5.96

The available information discloses that the taxpayer had additional net capital gains as indicated below:

Net capital gains as corrected	$ 2,535.21
Net capital gains as reported	2,529.25
Additional net capital gains	5.96

(d) Loss on Operation of Rental Property $5,541.85

The available information discloses that the taxpayer overstated the loss claimed on operation of rental property as indicated below:

Loss on operation of rental property as corrected	$2,778.63
Loss on operation of rental property as reported	8,320.48
Adjustment	$5,541.85

(e) Medical Expense Deduction 1,250.00

The taxpayer failed to substantiate medical expenses in excess of 5% of adjusted gross income as corrected; hence deduction claimed is disallowed.

Adjusted gross income as corrected:	
Reported per return	$42,090.88
Adjustments this report:	
Item (a)	255,398.75
Item (b)	21,902.05
Item (c)	5.96
Item (d)	5,541.85
Adjusted gross income as corrected	$324,939.49
5% of adjusted gross income as corrected	16,246.97
Medical expenses substantiated in excess of $16,246.97	- 0 -
Medical expenses deductible	- 0 -
Claimed per return	1,250.00
Disallowed	1,250.00

(f) Interest Expense 9,129.24

The available information discloses that the taxpayer overstated the deduction for interest paid.

Interest deduction claimed per return	$24,506.50
Interest deduction as corrected	15,377.26
Overstatement of interest deduction	$ 9,129.24

COMPUTATION OF INCOME TAX FOR INDIVIDUALS NOT USING TAX TABLE—1949

Net income			$308,245.12
Less: Exemption (2) x $600			1,200.00
Income subject to tentative tax			$307,045.12
Income subject to tentative tax if separate return; or one-half of such income if joint return			$307,045.12
Tentative tax			$254,231.06
Less: Adjustment for tax on partially tax-exempt interest			
Balance of tentative tax			$254,231.06
Tax Reduction:		Rate	
Balance of Tentative tax		(Calendar years 1948 and 1949	Amount
$0	$400	17%	$ 68.00
$400	$100,000	12%	$11,952.00
Over $100,000		9.75%	$15,037.53
Total tax reduction			$ 27,057.53
Combined normal tax and surtax			$227,173.53

Multiply amount of combined tax by 2 if joint return		
Alternative tax		$226,786.91
Less: Income tax payments to a foreign country or United States possession		
Balance of income tax liability		$226,786.91
Income tax liability disclosed by return		3,643.11
Deficiency in income tax		$223,143.80
50% Fraud Penalty (Sec. 293(b) I. R. C.)		$111,571.90
Sec. 291(a) Penalty		55,785.95

COMPUTATION OF ALTERNATIVE TAX—INDIVIDUALS—1949

Income subject to tentative tax if separate return; or one-half of such income if joint return		$307,045.12
Less: Excess of net long-term capital gain over net short-term capital loss:	$ 1,203.37	
(a) If separate return, enter full amount		
(b) If joint return, enter one-half of such amount		
Balance subject to tentative tax		$305,841.75
Tentative tax		$253,135.99
Less: Adjustment for tax on partially tax-exempt interest		
Balance of tentative tax		$253,135.99

Tax Reduction: Balance of Tentative Tax	Rate	Amount	
$0 $400	17%	$ 68.00	
$400-$100,000	12%	$11,952.00	
Over $100,000	9.75%	$14,930.76	
Total tax reduction			$ 26,950.76
Combined partial normal tax and surtax			$226,185.23
Multiply amount of combined partial tax by 2 if joint return			
Add: 50% of excess of net long-term capital gain over net short-term capital loss in (a), above, if separate return; full amount in (b) above, if joint return			$ 601.68
Alternative tax			$226,786.91

Computation of Addition to Tax for Substantial underestimation of Declaration of Estimated Tax under Section 294(d) (2) of the Internal Revenue Code

Corrected Tax	$226,786.91
Less: Withholding Tax Actually Withheld	
Estimated Tax	
Difference	$226,786.91
Addition to Tax (6% of above balance)	13,607.21

Failure to File a Declaration of Estimated Tax on Time
Section 294(d) (1) (A)

Corrected Tax	$226,786.91
Less: Withholding Tax Actually Withheld	
Overpayment credit, if any, from a prior year	- 0 -
Balance to be divided into 4 installments due	$226,786.91
Amount due—$226,786.91 (Return filed 2-28-52 but no payment made thereon)	
@ 10% Addition to Tax	$ 22,678.69

ADJUSTMENTS TO NET INCOME—1950

Net income as disclosed by return	($ 27,512.02)
As corrected	92,703.83
Net adjustment as computed below	$120,215.85

Unallowable deductions and additional income:

(a)	Net Profit from profession	$72,332.90
(b)	Dividends	35,418.90
(c)	Net capital gains	7,167.66
(d)	Rental income	1,212.00
(e)	Loss on operation of rental property	1,299.42
(f)	Interest Income	2,300.00
(g)	Interest paid	484.97
	Total	$120,215.85
Net adjustment as above		$120,215.85

EXPLANATION OF ITEMS—1950

(a) Net Profit from Profession		$ 72,332.90
The available information discloses that the taxpayer had additional net profit from his profession as indicated below:		
Net profit from profession as corrected	$54,812.79	
Net profit from profession as reported	($17,520.11)	
Additional net profit from profession	$72,332.90	
(b) Dividend Income		35,418.90
The available information discloses that the taxpayer had additional dividend income as indicated below:		
Dividend income as corrected	$43,562.15	
Dividend income as reported	8,143.25	
Adjustment	$35,418.90	
(c) Net Capital Gains		7,167.66
The available information discloses that the taxpayer had additional net capital gains as indicated below:		
Net capital gains as corrected	$10,653.12	
Net capital gains as reported	3,485.46	
Adjustment	$ 7,167.66	
(d) Rental Income		$1,212.00
The taxpayer failed to report the receipt of rental income from the subletting of one of his law offices.		
(e) Loss on Operation of Rental Property		1,299.42

The available information discloses that the taxpayer overstated the loss claimed on operation of rental property as indicated below:

Loss on operation of rental property as reported	($4,283.96)
Loss on operation of rental property as corrected	(2,984.54)
Adjustment	$ 1,299.42

(f) Interest Income — 2,300.00

The taxpayer failed to report the receipt of interest income in the amount stated above.

(g) Interest Paid — 484.97

The taxpayer failed to substantiate non-business as indicated below:

Amount claimed per return	$16,511.54
Amount substantiated	16,026.57
Adjustment	$ 484.97

COMPUTATION OF INCOME TAX FOR INDIVIDUALS NOT USING TAX TABLE—1950

Net income	$92,703.83
Less: Exemption (2) x $600	1,200.00
Income subject to tentative tax	$91,503.83
Income subject to tentative tax if separate return; or one-half of such income if joint return	
Tentative tax	$91,503.83
	$59,928.33

Less: Adjustment for tax on partially tax-exempt interest			
Balance of tentative tax			$59,928.33
Tax Reduction:			
Balance of Tentative tax	Rate (Calendar year 1950)	Amount	
0 $400	13%	$ 52.00	
$400-$100,000	9%	5,357.55	
Over $100,000	7.3%		
Total tax reduction			$ 5,409.55
Combined normal tax and surtax			$54,518.78
Multiply amount of combined tax by 2 if joint return			
Alternative tax			$54,083.85
Less: Income-tax payments to a foreign country or United States possession			
Balance of income tax liability			$54,083.85
Income tax liability disclosed by return (By tax withheld)			30.00
Deficiency in income tax			$54,053.85
50% Fraud Penalty (Sec. 293(b) I. R. C.)			$27,026.93
Sec. 291(a) Penalty			13,513.46

COMPUTATION OF ALTERNATIVE TAX—INDIVIDUALS—1950

Income subject to tentative tax if separate return; or one-half of such income if joint return		$91,503.83
Less: Excess of net long-term capital gain over net short-term capital loss:		1,491.05
(a) If separate return, enter full amount		
(b) If joint return, enter one-half of such amount		
Balance subject to tentative tax		$90,012.78
Tentative tax		$58,631.12
Less: Adjustment for tax on partially tax-exempt interest		
Balance of tentative tax		$58,631.12
Tax Reduction:		
Balance of Tentative Tax	Rate	Amount
$0	13%	$ 52.00
$400-$100,000	9%	5,240.80
Over $100,000	7.3%	
Total tax reduction		$ 5,292.80

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1237

M. LOIS CORSON, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Harry J. Alker, Jr.,[1] an attorney with a considerable estate and tax practice, was convicted of willful evasion of taxes for the years 1947 through 1950.

[1] Harry J. Alker, Jr., is the principal taxpayer and shall for convenience be referred to hereinafter as "petitioner." M. Lois Corson and Marion Alker are his sisters. The courts below upheld substantially all of the Commissioner's adjustments in the sisters' incomes for the years 1948 and 1950 based on unreported dividend and rental income and disallowance of unsubstantiated deductions.

His conviction was affirmed on appeal and this Court denied review. *United States* v. *Alker*, 260 F. 2d 135 (C.A. 3), certiorari denied, 359 U.S. 906. Thereafter, the Commissioner determined deficiencies in income tax due for the years 1946 through 1950 and assessed civil fraud penalties for each of the years in question. The parties stipulated that the record in the criminal trial would constitute evidence in the civil trial. The Commissioner also determined that certain income and deductions claimed by petitioner's sisters were in fact allocable to petitioner and determined deficiencies in income taxes due against the sisters for the years 1948 and 1950.

The Tax Court found, on the basis of the entire record before it (1) that the Commissioner's deficiency determinations against petitioner and his sisters for the years 1946-1950 were correct, (2) that petitioner had been guilty of fraud in 1947-1950 and thus that the fraud penalty was applicable for those years, and (3) that petitioner had failed to file a return for the year 1946 and thus that the delinquency penalty applied for that year. On review, the Third Circuit affirmed the Tax Court's findings on the ground that they were supported by sufficient evidence in the record.

This case presents solely factual questions which have been resolved against petitioner by the Tax Court and the court of appeals. The concurrent findings by the courts below that the petitioner fraudulently failed to report income in the years in question is amply supported by the evidence and does not

warrant further review here. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Rudolph* v. *United States*, 370 U.S. 269, 271.[2]

Petitioner also addresses himself at length to the issue of collateral estoppel, arguing that his criminal conviction does not preclude him from denying fraud in the instant civil proceeding. However, neither the Tax Court nor the court of appeals invoked the doctrine of collateral estoppel in the instant case. The lower courts based their decisions on the evidence in the record, including the evidence adduced at the criminal trial which, by stipulation of the parties, was made a part of the record in this case (See Pet. 83).

The Commissioner is not bound, as petitioner contends (Pet. 29, 31-32), by the figures asserted as deficiencies in the criminal case. Since a determination of the exact amount of a deficiency is not essential to a conviction of willful evasion,[3] there has been no liti-

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[2] Petitioner's principal complaints are that the Commissioner and the courts overvalued certain stock received by him as compensation for legal services performed and failed to find that he was required to pay a portion of certain other fees which he received over to others. These factual issues have been resolved below and present no question of general importance.

[3] *United States* v. *Johnson*, 319 U.S. 503, 517; *Katz* v. *United States*, 321 F. 2d 7, 11 (C.A. 1), certiorari denied, 375 U.S. 903; *Gendelman* v. *United States*, 191 F. 2d 993, 996 (C.A. 9), certiorari denied, 342 U.S. 909; *United States* v. *Schenck*, 126 F. 2d 702, 704 (C.A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705; *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C.A. 7), certiorari denied, 301 U.S. 689.

gation of a question of fact essential to judgment, and collateral estoppel cannot apply. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601.

Nor has petitioner been deprived of any constitutional rights under the Fifth and Sixth Amendments (Pet. 28-29). Himself a lawyer, he was represented by counsel throughout the proceedings and retained an accountant to summarize his books and records for trial (Pet. 36-46).

The decision below was correct and there are no questions of general importance warranting further review. The petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
DEENE R. GOODLAW,
Attorneys.

MAY, 1967.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1237.

M. LOIS CORSON, et al.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ROBERT M. TAYLOR,
833 Land Title Building,
Philadelphia, Pa. 19102
Attorney for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 1237.

M. LOIS CORSON, ET AL.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request that this Court grant rehearing of its order dated May 22, 1967, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the question whether petitioner's (Harry J. Alker, Jr.) constitutional rights had been violated particularly as provided by the Fifth Amendment thereto concerning due process and equal protection of the law.

The petitioner would like to go beyond that and prove that his constitutional rights were also violated under the Fourth and Sixth Amendments thereto concerning unlawful search and seizure and right to counsel.

The petitioner in his criminal tax case was subject to investigation by Internal Revenue agent Henry Segal and special agent Herbert S. Mednick of the Intelligence Division, Internal Revenue Service. All of the criminal case record was stipulated into the civil tax case record.

Henry Segal, in the criminal trial, testified he first got into Mr. Alker's case in the spring of 1950; that he first saw him on May 3, 1950, identified himself and told him the purpose of his visit was to examine his income tax returns, books and records for years 1947 and 1948; that he was assigned his returns and that he was to make a routine audit like any other taxpayer's returns. See joint Appendix Volume II, pages 313a, 314a and 324a.

Herbert S. Mednick, in the criminal trial testified that he was a special agent of the Intelligence Division of the Internal Revenue Service from March, 1946 to March, 1953; that while he was with the Service he first got into and worked upon the case of Harry J. Alker, Jr., in the summer of 1950; that when he first entered the case and first talked to Mr. Alker he told him who he was and that he was investigating his case.

That he further asked Mr. Alker for his books and records at said meeting on December 30, 1950. He testified (J. A. II, Pp. 408a, 409a) as follows, inter alia,

> "A. Well, I had—I introduced myself and asked him for the books and records at our first meeting, and his first reaction was that we had no right to them, and he thought we were not really agents of the Internal Revenue Service but agents of the Federal Deposit Insurance Corporation, and he first said he didn't want us to have them because we were going to give them to the Federal Deposit Insurance Corporation, which was interested in his financial position.
>
> Q. Did you tell him that you were with the Internal Revenue Service and not the F. B. I.?
>
> A. We tried to reassure him."

Special agent Mednick further testified that he asked Mr. Alker for all of his books of account, his ledgers, cancelled checks, his bank statements and any and all records of any kind. From all of his entire testimony he received the same for all the years involved from 1947 to 1950, inclusive; and it was from these books and records, petitioner's indictment was founded.

(Joint Index, Volume II, pages 407a, 409a).

As can readily be seen by the foregoing testimony the Special Agent never informed petitioner that he was a suspect in a criminal tax investigation which was then focused upon him, and that the investigation was no longer a routine tax audit like any other taxpayer's return. That he never fully identified himself, and neither showing him his credentials nor giving him any constitutional warning whatsoever.

It can also readily be seen that the said agents fraudulently deceived and misled the petitioner as to the true nature of their investigation, such as in United States v. Lipshitz, 132 F. Supp. 519 and Matter of Bodkin, 165 F. Supp. 25. That the petitioner's statements, books and records were not made and given freely and voluntarily by him. That substantially all of petitioner's books and records for the involved years were obtained after the special agent entered the case. These statements, books and records were protected by the Fourth and Fifth Amendments and did not have to be turned over to the Government agents by the petitioner, and he would not have turned them over had he been properly warned and apprised of the agents' real purpose. That he was misled into believing that they were only making a routine audit of his tax returns civilly and not criminally.

It is well known and acknowledged in law and fact that such a special agent is a policeman or criminal detective or investigator. That criminal tax investigations are conducted by special agents and that their sole function is to uncover evidence justifying a criminal prosecution. That

his investigation is a deceiving type of endeavor to obtain incriminating evidence through informal questioning and a search of the taxpayer's books and records. His investigation is usually started in response to information that a criminal violation has occurred or that there is a good possibility of such having occurred. His investigation therefore is not an open inquiry into an unsolved crime. The suspected tax evader is in the position of an accused person from the outset and the ring of evidence expands and builds around him.

It is contended that it is at the initial interview with the special agent that a taxpayer really needs his constitutional warnings and that is when his case is won or lost, and not in the Court trial.

In *United States v. Schoenberg,* 67-1 U. S. T. C. #9393 the Court found that under the provisions of the Internal Revenue Agent's Manual it is provided that upon the entry of a special agent it becomes a new investigation of a "criminal nature" and the civil tax liability is no longer involved. The Internal Revenue Agent's Manual specifically provides that the civil investigation is suspended.

In *Johnson v. Zerbst,* 304 U. S. 458, it was held ". . . if the accused does not affirmatively, knowingly and with the understanding of the consequences waive his right to counsel, then there has been a violation of the accused's Sixth Amendment guarantee," and this Honorable Supreme Court has held in *Escobedo v. Illinois,* 378 U. S. 478, that ". . . the focusing upon a particular suspect can occur prior to the indictment stage," and with respect to the interrogation of Mr. Alker at his office and the examination of his books and records by the special agent and revenue agent, it was as this Court observed in *Escobedo* that the petitioner had become the accused, and the purpose of the interrogation was to get him to confess his guilt, despite his Constitutional Rights not to.

There is no evidence in the criminal case record that the special agent or revenue agent gave the petitioner any

warning whatsoever that he was a suspect in a criminal prosecution nor advised him that he was entitled to have his personal counsel present at their interviews; that he could remain silent; that he did not have to turn over his books and records to them; that whatever he told them and whatever books, records and information he turned over to them would or might be used against him in a court of law; and that he did not have to incriminate himself or be a witness against himself. It is submitted and contended that all of the information was obtained from petitioner by fraud, misrepresentation and deceit of the agents, and not voluntarily given by petitioner and therefore should be suppressed and not used either in the criminal or civil case or in any manner. No conviction can stand in the face of constitutional mandates and may be attacked at any time. Such actions of the agents certainly deprived the petitioner of his freedom of action and of his liberty without due process of law. The agents did not have or never produced a lawful search warrant on any of their visits to the petitioner's office. There can be no question but that the conduct of the Government agents misled the petitioner into properly defending himself; and a Court should not forgive the requirements of the Fourth, Fifth and Sixth Amendments in the name of law enforcement.

The jeopardy assessments also restricted petitioner's constitutional rights as a citizen in that he was deprived of his moneys and property so that he could not properly defend himself by the timely employment of counsel and acountants. Jeopardy assessments as used by the Commissioner are too broad in their sweep and should be more greatly controlled and restricted by the Court.

Attached hereto, made part hereof and marked "Exhibit A" is a copy of a letter dated July 7, 1954, which discloses that a value of $265.00 was put upon the Freihofer Baking Company stock by the William Freihofer Baking Company. This contradicts the Government's valuation of $510.00 per share of said stock.

Petitioner feels equity and justice require the Court's attention should be called to his long illness and the illness of his accountant; and the difficulty of counsel in obtaining all the facts, particularly to the fact that he was chief counsel in many matters which covered many states and counties and in these it was necessary to associate counsel in each jurisdiction. The moneys received therefrom covered all counsel involved.

It appears petitioner was charged for substantially all of the moneys and credit was not given for shares paid to others. They also were for petitioner's legal charges and acountant's charges. Petitioner was only entitled to his portion and the accounting firm was entitled to its portion. The Internal Revenue Service charged petitioner with all of it. This was very unfair as it amounted to considerable.

The above are also reasons why the matter should be referred back for further clarification.

There have been many cases decided by the Federal Courts, District and Appellate, concerning the status of special agents' investigations and suppression of such evidence obtained therefrom, since petitioner's criminal trial, some of them being adverse to petitioner's contentions, particularly as to the question of voluntariness, while others uphold his contentions.

In these days of constitutional turmoil concerning the rights and privileges of an accused person as guaranteed by the United States Constitution and its amendments, certain cases such as *Massiah, Gideon v. Wainwright, Escobedo, Miranda, Johnson* and *Russo* did not exist at the time of petitioner's conviction, but *Boyd, Weeks, Gouled* and *Silverthorne* did, and it is submitted that the petitioner should be granted any and all benefits that he is entitled to from these decisions under the facts and circumstances of his case.

It is obvious that a taxpayer charged with violating the Internal Revenue Code is entitled to the same constitutional

protection as a person charged with committing a crime of violence. It is also obvious that when the special agent first visited the petitioner the routine investigation (if it was such) moved from the investigating stage to the accusatory stage where a criminal prosecution against petitioner was contemplated; and the agents procured their evidence from him by deceptive and fraudulent means, specifically, by attempting to obtain evidence for a criminal prosecution under the guise of conducting a routine audit.

The answers to these question in the criminal and civil tax field are of the greatest importance in their impact upon the administration of justice in the Federal Courts and this Honorable Supreme Court should now issue such guidelines for the future which should in turn greatly reduce litigation in the tax fields.

The petitioners feel and believe that their daily mail was intercepted by Government agents during their investigation. Petitioner, M. Lois Corson states several letters received by her in the mail had been slit open and then partially sealed. Petitioner, Harry J. Alker, Jr., also believes the same happened to his outgoing and incoming mail. However, upon their inquiry of the Honorable Solicitor General they were advised by him that a review of their case in accordance with the policy they announced to this Supreme Court in *United States v. Schipani*, 385 U. S. 37, produced no information subject to disclosure under that policy.

Petitioners submit that it is their belief and pray the Court to find that the fundamental protections of the constitution were not meant to be so easily evaded by Government officers. That the affirmance of their conduct would be unjust, unfair, inequitable, unconscionable and would unlawfully enrich the Government at the petitioners' great loss and expense.

There now exists clear and express conflicts of decisions among the Federal Courts as to the aforementioned questions and it is appropriate that the instant Alker case

be reviewed by this Honorable Supreme Court and the lower Courts' opinions be reversed or the matter sent back for further hearing with this Court's instructions pertaining to same. It is felt that in this manner an honest, fair and amicable finality could be consummated satisfactory to all parties concerned.

In *United States v. Davis,* 259 F. Supp. 496, 498 the Court refused to take the "huge step" that would extend *Miranda* to the field of "administrative investigation"; and another Court conceded that it "may be . . . that the rules prescribed by *Miranda* will apply with increasing sweep" to questioning by law enforcement officers. *United States v. Gleason,* 67-1 U. S. T. C. #9297. Other cases favorable to suppression are *United States v. Kingry,* 67-1 U. S. T. C. #9262 and *United States v. Gower,* 65-2 U. S. T. C. #15655.

Contrary thereto are *Kohatsu v. United States,* 351 F. 2d 898 (1965), Cert. denied, 384 U. S. 1011 (1966); *Rickey v. United States,* 360 F. 2d 32 (1966), Cert. denied, 385 U. S. (1966); *United States v. Fiore,* 258 F. Supp. 405, 441 (1966) and others.

In *United States v. Rundle,* 258 F. Supp. 647 (1966) (E. D. of Pa.) the Court in its opinion, page 655, refers to the case of *Davis v. State of North Carolina,* 384 U. S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895, and quotes from it as follows:

> "The review of Voluntariness in Cases in which the trial was held prior to our decisions in Escobedo and Miranda is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogatories, as is now required of Miranda, is a significant factor in considering the voluntariness of statements later made. This factor has now been recognized in several of our prior decisions dealing with standards of voluntariness . . . . Thus, the fact Davis was never effec-

tively advised of his rights gives added weight to the other circumstances described below which made his confession involuntary." (*Davis v. State of California,* 86 S. Ct. at page 1764). The Court then states, ". . . . It is not meaningful to characterize the relator's statement as involuntary or coerced in the sense that the police threatened him physically and thus overbore his will. Yet, in a larger sense, it is relevant to speak of the statement having been obtained by psychological coercion. See *United States ex rel. Perfiglia v. Rundle,* 221 F. Supp. 1003 (E. D. of Pa. 1963); and United States v. Wheeler, 149 F. Supp. 445.

Also see James A. Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660 (1966), and Paul P. Lipton, "Constitutional Rights In Criminal Tax Investigations," American Bar Association Journal, June 1967, Vol. 53, Pages 517-521.

Conclusion.

For the reasons set forth in this Petition for Re-hearing, as well as in the Petition For Certiorari, previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

Robert M. Taylor

ROBERT M. TAYLOR,
Attorney for Petitioner.

Certificate of Counsel.

Pursuant to Rule 58, I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

Robert M. Taylor

ROBERT M. TAYLOR,
Attorney for Petitioner.

Exhibit "A".

PEAT, MARWICK, MITCHELL & Co.
1500 Walnut Street
Philadelphia 2, Pa.

July 7, 1954

Mr. Ross D. Miller, President
Wm. Freihofer Baking Company
12 South 12th Street
Philadelphia, Pa.

Dear Mr. Miller:

This is in response to your inquiry as to the tax consequences of the proposed sale by Mrs. William Freihofer of 1,800 shares of common stock of Freihofer Baking Company, which she owns outright, to Wm. Freihofer Baking Company at a price per share consisting of $70 in cash and $195 in debentures of Wm. Freihofer Baking Company.

We understand that if Wm. Freihofer Baking Company secures options covering all of the common stock of Freihofer Baking Company and exercises such options, it will issue notes payable on the date of settlement to the various common stockholders of Freihofer Baking Company at the rate of $265 per share. We understand further that such notes will be paid at the rate of $70 per share in cash at 30 days after the date of settlement, the balance of $195 per share to be issued in debentures at 60 days after the date of settlement.

You have informed us that upon obtaining control, Wm. Freihofer Baking Company intends to borrow $600,000 from its wholly owned subsidiary, Freihofer Baking Com-

pany, and that such cash together with other funds of Wm. Freihofer Baking Company will be used to satisfy the cash requirements of $70 per share referred to above.

While it is impossible for us to have knowledge of the attitude of the Internal Revenue Service toward a transaction of the kind referred to herein or to have knowledge of future tax laws and court decisions, it is our opinion based upon our past experience that under the contemplated transaction described herein Mrs. Freihofer would not be subject to a Federal income tax on an alleged devidend arising from the transaction.

Yours very truly,

PEAT, MARWICK, MITCHELL & Co.

GCL:bc

cc: Mrs. William Freihofer
Ventnor & Oxford Avenues, Ventnor, N. J.

Mr. H. J. Alker
1505 Land Title Building, Phila., Pa.

Mr. A. N. Eckardt
Oxford Ayon Apartments, Oxford Avenue,
Ventnor, N. J.